Docket for 04-495

(13)

No. 04-495
Title: Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al., Petitioners
v.
Charles E. Austin, et al.
Docketed: October 13, 2004
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (02-3429, 02-3816)
Decision Date: June 10, 2004
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Aug 23 2004 | Application (04A174) to extend the time to file a petition for a writ of certiorari from September 8, 2004 to October 8, 2004, submitted to Justice Stevens. |
| Aug 27 2004 | Application (04A174) granted by Justice Stevens extending the time to file until October 8, 2004. |
| Oct 8 2004 | Petition for a writ of certiorari filed. (Response due November 12, 2004) |
| Oct 8 2004 | Appendix of Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. |
| Nov 12 2004 | Brief of respondents Charles E. Austin, et al. in opposition filed. |
| Nov 22 2004 | Reply of petitioners Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. (Distributed) |
| Nov 23 2004 | DISTRIBUTED for Conference of December 10, 2004. |
| Dec 13 2004 | Petition GRANTED. |
| Jan 14 2005 | Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including January 28, 2005. |
| Jan 19 2005 | SET FOR ARGUMENT ON Wednesday, March 30, 2005. |
| Jan 28 2005 | Brief amicus curiae of United States filed. |
| Jan 28 2005 | Brief amici curiae of California, et al. filed. |
| Jan 28 2005 | Joint appendix filed. |
| Jan 28 2005 | Brief of petitioners Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. |
| Feb 14 2005 | Record received from U.S.C.A. Sixth Circuit. (1 binder) |
| Feb 15 2005 | CIRCULATED. |
| Feb 18 2005 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Feb 23 2005 | Record received from U.S.D.C. Northern District of Ohio. |
| Mar 3 2005 | Brief amici curiae of Corrections Professionals filed. (Distributed) |
| Mar 3 2005 | Brief amici curiae of Professors and Practitioners of Psychology and Psychiatry filed. (Distributed) |
| Mar 4 2005 | Brief of respondents Charles E. Austin, et al. filed. (Distributed) |
| Mar 4 2005 | Brief amici curiae of Human Rights Watch, et al. filed. (Distributed). |
| Mar 4 2005 | Brief amicus curiae of Percy Pitzer filed. |
| Mar 7 2005 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |

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|---|---|
| Mar 22 2005 | Reply of petitioners Reginald A. Wilkinson, Director, Ohio Department of Rehabilitation and Correction, et al. filed. (Distributed) |
| Mar 30 2005 | Argued. For petitioners: James M. Petro, Attorney General, Columbus, Ohio; and Deanne E. Maynard, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Jules Lobel, Pittsburgh, Pa. |

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No. ____

**In The Supreme Court Of The United States**

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REGINALD WILKINSON, et al.,
*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,
*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in *Hewitt v. Helms*, 459 U.S. 460 (1983), satisfy the prisoner's due process rights?

## LIST OF PARTIES

The Petitioners are current or former officials of the Ohio Department of Rehabilitation and Correction ("ODRC"):

Reginald Wilkinson, Stephen Huffman, Todd Ishee, Bruce Martin, Deborah Nixon-Hughes, Cheryl Jorgenson-Martinez, Manish B. Joshi, Patrick F. Biggs, Audrey Sandor Nietzel and Matthew Meyer (collectively "Ohio").

The Respondents are a class of prisoners who have been or may be housed in the Ohio State Penitentiary, Ohio's only supermaximum-security prison. The class representatives are:

Charles E. Austin, Robert Baksi, Michael Benge, Alonzo L. Bonner, August Cassano, David E. Clark, James DeJarnette, Roy D. Donald, David Easley, Brian K. Eskridge, Keith Gardner, Roger Lee Hall, Frederick O. Harris, Jr., Daryl Heard, Edward O. Hodge, Orsino Iacovone, Kunta Kenyatta, Stacy Lane, James D. Mitchell, Emanuel B. Newell, John W. Perotti, Lamar Preston, Jason H. Robb, Kevin B. Roe, Richard Siggers, Eric Swofford, Lahray Thompson, Edward A. Tilley, and Mark Trawick.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

PETITION ..... 1

OPINIONS BELOW ..... 1

JURISDICTIONAL STATEMENT ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

INTRODUCTION ..... 2

STATEMENT OF THE CASE ..... 3

A. The purpose and nature of supermax prisons. ..... 4

B. Selecting inmates for placement in supermax confinement. ..... 5

1. Identifying inmates for transfer to OSP. ..... 6

2. Procedures for determining whether an inmate is retained in supermax status. ..... 7

**Page**

C. The proceedings below. ..... 8

REASONS FOR GRANTING REVIEW ..... 11

A. The circuits are split over the process due before a prisoner is placed in highly restrictive confinement based on a predictive assessment of security risks. ..... 11

1. The Third, Eighth and D.C. Circuits hold, both before and after *Sandin*, that *Hewitt* controls administrative placement decisions because of the multivariate, predictive nature of the decision. ..... 12

2. The Sixth and Ninth Circuits hold that *Sandin* requires that *Wolff*, rather than *Hewitt*, controls the "what process is due" question for predictive placement decisions. ..... 15

3. The Second Circuit has *said* that *Hewitt* controls, but has adopted stricter procedural requirements for administrative placements than *Hewitt* compels. ..... 18

B. The Sixth Circuit's decision conflicts with this Court's precedents on the process due when state action implicates a prisoner's liberty interest. ..... 20



**Page**

1. The Sixth Circuit erred in concluding that *Sandin v. Conner* changed the process due prisoners deprived of liberty interests. ..... 20

2. The decision below conflicts with this Court's holdings that require a focus on the prospective or retrospective nature of the decision in deciding what type of process is due. ..... 21

C. The circuit split on this issue has significant consequences for day-to-day prison operations. ..... 24

CONCLUSION ..... 25

## TABLE OF AUTHORITIES


**Cases** **Page**

*Austin v. Wilkinson*,
189 F. Supp. 2d 719 (N.D. Ohio 2002) ..... 1, 8, 9

*Austin v. Wilkinson*,
204 F. Supp. 2d 1024 (N.D. Ohio 2002) ..... 1, 8, 9

*Austin v. Wilkinson*,
372 F.3d 346 (6th Cir. 2004) ..... *passim*

*Benjamin v. Fraser*,
264 F.3d 175 (2d Cir. 2001) ..... 19

*Board of Curators v. Horowitz*,
435 U.S. 78 (1978) ..... 2, 9, 22

*Brown v. Plaut*,
131 F.3d 163 (D.C. Cir. 1997) ..... 13

*Clark v. Brewer*,
578 F. Supp. 1501 (S.D. Iowa 1983) ..... 14

*Clark v. Brewer*,
776 F.2d 226 (8th Cir. 1985) ..... 14

*Crosby-Bey v. District of Columbia*,
786 F.2d 1182 (D.C. Cir. 1986) ..... 13

*Greenholtz v. Inmates of the Nebraska Penological and Correctional Complex*,
442 U.S. 1 (1979) ..... 2, 9, 22

*Hewitt v. Helms*,
459 U.S. 460 (1983) ..... *passim*





**Page**

*Keenan v. Hall*,
83 F.3d 1083 (9th Cir. 1996) ..... 16

*Lewis v. Casey*,
518 U.S. 343 (1996) ..... 21

*Matiyn v. Henderson*,
841 F.2d 31 (2d Cir. 1988) ..... 19

*Mathews v. Eldridge*,
424 U.S. 319 (1976) ..... 10, 17, 21

*McKune v. Lile*,
536 U.S. 24 (2002) ..... 21

*Meachum v. Fano*,
427 U.S. 215 (1976) ..... 23

*Mims v. Shapp*,
744 F.2d 946 (3d Cir. 1984) ..... 12

*Ohio Adult Parole Auth. v. Woodard*,
523 U.S. 272 (1998) ..... 21

*Overton v. Bazzetta*,
539 U.S. 126 (2003) ..... 21

*Sandin v. Conner*,
515 U.S. 472 (1995) ..... *passim*

*Shoats v. Horn*,
213 F.3d 140 (3d Cir. 2000) ..... 12

*Soto v. Walker*,
44 F.3d 169 (2d Cir. 1995) ..... 19

**Page**

*Taylor v. Rodriquez*,
238 F.3d 188 (2d Cir. 2001) ..... 18

*Toussaint v. McCarthy*,
801 F.2d 1080 (9th Cir. 1986) ..... 16

*Wolff v. McDonnell*,
418 U.S. 539 (1974), ..... *passim*

*Young v. Harper*,
520 U.S. 143 (1997) ..... 21

**Statutes**

28 U.S.C. § 1254(1) ..... 1

**Other Authorities**

Chase Riveland, *Supermax Prisons: Overview and General Considerations*,
(Nat'l Inst. of Corrs. 1999) ..... *passim*

*Federal Bureau of Prisons Weekly Population Report*
(September 30, 2004) ..... 24

ODRC Policy 53-CLS-01 § V ..... 6

ODRC Policy 111-07 ..... *passim*

*Prison and Jail Inmates at Midyear* 2003,
(Bureau of Justice Statistics 2004) ..... 24

*Supermax Housing: A Survey of Current Practice*,
(Nat'l Inst. of Corrs. 1997) ..... 5, 24



**Page**

*The Corrections Yearbook: Adult Corrections 2002*,
(Criminal Justice Inst., Inc. 2003) ..... 24

## PETITION

Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Correction ("ODRC"), and the other Petitioners, respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

This case involves three relevant opinions: *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004), reproduced at App. 1a–35a; *Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002) ("*Austin* I"), reproduced at App. 47a–121a; and *Austin v. Wilkinson*, 204 F. Supp. 2d 1024 (N.D. Ohio 2002) ("*Austin* II"), reproduced at App. 39a–46a.

## JURISDICTIONAL STATEMENT

The judgment and opinion below were entered June 10, 2004. No rehearing petition was filed below. On August, 27, 2004, this Court extended the time to file this petition until October 8, 2004. Order Extending Time to File, No. 04A174. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the Fourteenth Amendment to the United States Constitution and former ODRC Policy 111–07.

The Fourteenth Amendment provides, in relevant part, that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

## INTRODUCTION

This case is about choosing the right tool for an inherently difficult, and increasingly common, job—determining which inmates must be isolated in a "super-maximum security" prison to reduce danger to all who live or work in a State's prisons. That sensitive task requires "[d]iagnoses, prediction, risk assessment, and identification of causal factors" that "often defy objective criteria." Chase Riveland, *Supermax Prisons: Overview and General Considerations* (Nat'l Inst. of Corrs. 1999), at 9. This already-difficult task is now even harder for prison officials, because no precedent from this Court definitively establishes what kind of process the Due Process Clause requires for these predictive placement decisions, and the circuits have split on this important question.

The Third, Eighth and D.C. Circuits have correctly adopted the due process framework that this Court established for predictive, multivariate decisions in *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); and *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). That model recognizes that the very nature of these predictive decisions makes them "singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9. The model thus requires only "an informal, nonadversary evidentiary review" involving notice and some opportunity for affected person to present his views. *Id.* at 476.

By contrast, the decision below aligns the Sixth Circuit with the Ninth, and arguably the Second, in requiring a qualitatively different type of process, the type required for disciplinary hearings by *Wolff v. McDonnell*, 418 U.S. 539 (1974). Because *Wolff*-type process is designed for retrospective determination of specific facts (whether an



inmate violated prison rules), it requires very different procedures: detailed advance notice of specific charges, the right to call witnesses, and written findings stating the evidence and reasoning underlying the decision.

Ohio seeks review because the *Wolff* model simply does not work for predictive placement decisions like the supermax placement decisions at issue here. *Wolff* process makes sense where prison officials are punishing prisoners for past wrongdoing, but supermax placement is about safe and effective prison management, not punishment. "Wardens [] invoke this procedure as a *preventative* . . . measure." Riveland, *supra*, at 8–9 (emphasis added). Forcing States to provide *Wolff*-type procedures for predictive decisions about which prisoners present security risks simply will not work. Those procedures have the wrong focus. It is the correctional analog to looking at the rear view mirror instead of through the windshield—you have a very narrow field of view and it tells you nothing about what is ahead. That results in bad decisions that in turn impose significant potential harm on persons (*i.e.*, other prisoners) who, by definition, have no way to avoid it.

As the Plaintiffs' leadoff witness acknowledged: "Human rights concerns cut both ways . . . . We are concerned about the rights of inmates to be safe and free from assaults or being preyed upon by dangerous inmates." The decision below hinders Ohio's ability to address that harm. Ohio therefore brings this petition to regain its ability to provide a safer and more secure prison environment.

## STATEMENT OF THE CASE

Three sets of facts are relevant to this petition: the purpose and nature of supermax prisons, the security classification system controlling supermax placements, and the course of proceedings below.

## A. The purpose and nature of supermax prisons.

Supermax prisons are a widespread but relatively recent development. The federal government and roughly two-thirds of the states operate such facilities. *Supermax Housing: A Survey of Current Practice* (Nat'l Inst. of Corrs. 1997), at 3. Most have opened since 1990. *Id.* This case concerns Ohio's only supermax prison, the Ohio State Penitentiary ("OSP"), which opened in 1998.

Supermax prisons like OSP are intended to concentrate the most disruptive inmates within a jurisdiction in a single facility in order to make the entire system safer. Such facilities were developed to deal with a "perceived 'toughening' of the inmate population, increased gang activity [and] the difficulty of maintaining order in severely overcrowded prisons." Riveland, *supra*, at 1. Accord *Supermax Housing*, *supra*, at 3 (managing disruptive inmates and coping with gangs identified as the two primary reasons for building supermax prisons).

Although typically only those inmates who have engaged in serious misconduct are placed in such facilities, supermax placement has a preventive rather than punitive goal: averting future problems by segregating disruptive inmates. "Wardens [] invoke this procedure as a preventative . . . measure." Riveland, *supra*, at 5. It is "a non-disciplinary status—that is, the placement is not a penalty with a determinate time affixed to it, but is based on a pattern or history of dangerousness or unconfirmed but reliable evidence of pending disruption." *Id.* at 8.

Not surprisingly, security must be extremely tight in such facilities. Conditions at OSP are typical of those found in other supermax prisons. For example, OSP prisoners are generally held in solitary confinement 23 hours a day and



isolated from other inmates during their time out of their cells. *Supermax Housing*, *supra*, at 4.

The States have always had similar units for isolating problem prisoners, commonly referred to as "administrative segregation" units. Although conditions in such units are essentially the same as in supermax facilities, supermax placements generally last longer than terms in administrative segregation. Riveland, *supra*, at 1–2, 10. The usual stay at OSP is at least a year.

## B. Selecting inmates for placement in supermax confinement.

Because of the purpose of supermax facilities—to prevent disruption in prison—the process for deciding which inmates are placed in such facilities is prospectively oriented. A national study of such processes noted that they should focus on "[d]iagnoses, prediction, risk assessment, and identification of causal factors." Riveland, *supra*, at 9. Ohio's does.

As detailed below, OSP placements do not automatically result from particular acts of misconduct. Rather, the placement decisions are based on a wide variety of predictive factors regarding the security risk a prisoner presents, including overall patterns of conduct and the system-wide impact of an inmate's presence in a less restrictive environment. The process for deciding which inmates can be safely released from supermax status is similarly based on predictive assessments. A committee is charged with using its "professional correctional judgment" to "determine whether there has been a diminishing of the inmate's risk to the safety of persons or institutional adjustment" on a periodic basis. ODRC Policy 111-07 § VI(H) & (I), App. 135a–140a.

**1. Identifying inmates for transfer to OSP.**

All prisoners in Ohio are assigned a rating from Level 1 (lowest risk) to Level 5 (highest risk). This classification is based on a predictive assessment of the likely security risk the prisoner presents based on a variety of characteristics about the prisoner's offense, any previous criminal conduct, his gang affiliation, etc. See ODRC Policy 53-CLS-01 § V, available at http://156.63.250.98; ODRC Policy 111-07 § VI(B)–(D), App. 125a–131a.

A prisoner receives an initial classification upon incarceration, but that classification is subject to change at any point during the prisoner's term, based on his conduct in prison. Prisoners classified at Level 1 through Level 4 are housed in prisons throughout Ohio. Inmates classified (or re-classified) at Level 5, however, are automatically transferred to OSP. Thus, the prisoners' challenge to supermax confinement is in fact a challenge to the procedures for Level 5 classification.

The procedure for classifying inmates as Level 5 is contained in ODRC Policy 111-07, issued January 3, 2002. Under that policy, classification as a Level 5 is triggered by one of two events: (1) an independent finding, in proceedings before the Rules Infraction Board that comply with *Wolff*, that the inmate has committed a serious violation of prison rules, or (2) the inmate's conviction for a new crime committed while in prison. Policy 111-07 § VI(C), App. 127a–130a.

While these events are the triggers, neither automatically results in reclassification. That is, reclassification is not a punishment for the prisoner's misconduct. Rather, if prison officials believe that the prisoner demonstrates an increased risk of future disruption, they prepare a written report that reviews the inmate's



characteristics and conduct more broadly (*i.e.*, age, time remaining on sentence, escape attempts, gang affiliations, history of violence in prison, etc.). Policy 111-07 § VI(C), App. 127a–130a; Security Designation (Long Form), App. 144a. A three-member classification committee then holds a classification hearing (after providing the inmate 48 hours notice) on the reclassification request. The inmate is permitted to make written and oral submissions at the hearing. Policy 111-07 § VI(C), App.127a–130a; Notice of Hearing Form, App. 144a.

Based on the information before it, the committee makes a predictive assessment regarding the inmate's future propensity for disruptive behavior. It then makes a classification recommendation to the Warden that includes a narrative description of "the nature of the threat the inmate presents and the committee's reasons for the recommendation." Policy 111-07 § VI(C), App. 127–130a; Classification Committee Report Form, App. 144a.

If the Warden approves the recommendation, he forwards it to ODRC's Bureau of Classification for final approval. Again, the inmate is provided the opportunity to object. Policy 111-07 § VI(C), App. 127a–130a. If the Bureau approves the recommendation, the prisoner is reclassified at Level 5 and transferred to OSP.

**2. Procedures for determining whether an inmate is retained in supermax status.**

Ohio also provides significant process when deciding whether a prisoner will stay in supermax. The prisoner's status is reviewed annually. The annual review again focuses on variety of factors that are designed to allow a predictive assessment of the risk the prisoner presents. These factors include the prisoner's underlying criminal offense, the time

left on his sentence, the reasons for his supermax placement, the time that has elapsed since the incident prompting placement, his conduct at OSP, the extent to which he has taken advantage of programming and his interaction with staff. Policy 111-07 § VI(F), (H) & (I), App. 133a–140a; Privilege/Security Level Review Form, App. 144a.

### C. The proceedings below.

The plaintiffs here are a class of prisoners who challenged the procedures for deciding which inmates are placed and kept at the security level resulting in supermax confinement. The plaintiffs claim, *inter alia*, that they have a liberty interest in staying out of supermax and that the processes for determining which inmates are placed and kept there are constitutionally inadequate because they fell short of the standards set by *Wolff*.

The district court agreed that, under *Sandin*, the inmates have a state-created liberty interest in avoiding supermax placement. *Austin I*, 189 F. Supp. 2d at 742, App. 96a. The court then turned to the separate question of how much process is due. On this issue, it concluded that the inmates were entitled to at least as much procedural protection as required by *Wolff*. It therefore ordered the State to provide the following additional procedural protections:

- Inmates must be provided "advanced written notice of all the specific evidence" to be considered. Matters not so identified cannot be considered. *Austin I*, 189 F. Supp. 2d at 747, 750, App. 106a, 114a; *Austin II*, 204 F. Supp. 2d at 1026, App. 40a.[1]

[1] The comprehensive notice requirement imposed by the district court "provides inmates appearing before the classification committees with more notice than that received by criminal defendants at trial, where the liberty interests at stake are obviously more substantial." See *Austin*, 372 F.2d at 363 (Rogers, J., concurring in part and dissenting in part), App. 30a.



- Inmates must be allowed to call witnesses, including inmates at other prisons, absent overriding security considerations. *Austin I*, 189 F. Supp. 2d at 747, App. 106a; *Austin II*, 204 F. Supp. 2d at 1026, App. 40a.

- Decisionmakers must provide exhaustive, "detailed and specific justification for [their] decision[s]." *Austin II*, 204 F. Supp. 2d at 1027, App. 42a; *Austin I*, 189 F. Supp. 2d at 753, App. 120a.

The district court also ordered that inmates already in supermax status be told what "specific conduct is necessary . . . to be reduced from [supermax] and the amount of time it will take before" that occurs. *Austin II*, 204 F. Supp. 2d at 1028, App. 44a.

Ohio appealed, challenging the district court's calculation of the process due. The State argued that *Wolff* was not the appropriate benchmark because *Wolff's* procedures were designed to determine specific historical facts. By contrast, the decision whether to place or retain an inmate in supermax status is a subjective, predictive decision based on a wide range of factors. Ohio instead urged the more flexible due process model that this Court adopted for predictive decisions in *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); and *Board of*

*Curators v. Horowitz*, 435 U.S. 78 (1978), and argued that Policy 111-07 already provided process far beyond that required by *Hewitt*.

The panel rejected Ohio's argument that *Hewitt* provided the appropriate procedural standard. Two judges held that all deprivations significant enough to implicate a liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995), are serious enough to create a presumption that *Wolff*-type procedures are necessary. *Austin*, 372 F.3d at 359–360, App. 23a. "Any liberty interest which passes *Sandin's* threshold comes with a higher presumption of process due." *Id.* at 359 n.12, App. 22a. The panel majority also discounted the significance of the nature (*i.e.*, predictive v. punitive) of the underlying decision: "It is not the nature of the decision which strikes the due process balance; it is the interests on both sides of that balance." *Id.* at 357, App. 18a–19a.

The dissent, by contrast, rejected the notion that *Sandin's* more stringent test for liberty interests should presumptively entitle post-*Sandin* liberty interests to more process. *Id.* at 363 (Rogers, J., concurring in part and dissenting in part), App. 31a. But like the majority, it rejected Ohio's argument that *Hewitt* controlled. It instead called for an independent vetting of Ohio's process under the formula set in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Applying that analysis, it concluded that the requirement that the notice of placement/retention proceedings contain an exhaustive recitation of evidence to be considered was improper because it too heavily burdened the government interest and did not contribute to more accurate decisions. *Austin*, 372 F.3d at 364 (Rogers, J., concurring in part and dissenting in part), App. 32a–34a.



Ohio now asks this Court to grant certiorari to review the Sixth Circuit's judgment that Ohio violated the inmates' due process rights in reclassifying them and transferring them to OSP.

## REASONS FOR GRANTING REVIEW

Review is warranted for three reasons. First, the Sixth Circuit's decision exacerbates a clear circuit split regarding what process is due prisoners where prison officials make administrative (i.e., non-punitive) prison placement decisions that deprive a prisoner of a state-created liberty interest in avoiding that placement. Second, the decision below conflicts with this Court's precedents holding that retrospectively focused procedures should not be applied to predictive decisions. Third, the resulting confusion affects thousands of urgent decisions essential to maintaining safety in prisons throughout the nation.

### A. The circuits are split over the process due before a prisoner is placed in highly restrictive confinement based on a predictive assessment of security risks.

Although the supermax concept has become more widespread in recent years, the only part of the concept that is actually new is the notion of housing these inmates in a wholly separate facility. States have always kept some of their inmates for long periods of time in supermax-type conditions in some part of their prisons, such as a separate administrative control wing, based on predictive assessments of the threat those prisoners present. Courts have therefore been required to determine what process is due when state regulations create a liberty interest in avoiding placement in those conditions. The circuits have reached conflicting results on this important issue, largely based on confusion about *Sandin*.

The decision below adds to that conflict. Six circuits have addressed the issue, going three different ways. The Third, Eighth, and D.C. Circuits have held, both before and after *Sandin*, that *Hewitt* provides the appropriate benchmark for assessing the quantum of process due when placement is based on a predictive assessment of future behavior. In contrast, the Sixth Circuit, joining the Ninth, has concluded that *Sandin* increased the process due when a liberty interest is found under its more demanding standard. Both of these circuits thus reject *Hewitt* as the benchmark. Finally, adding to the confusion, the Second Circuit has *said* that *Hewitt* controls, but it has actually imposed procedural requirements going well beyond what *Hewitt* requires. Only this Court can provide definitive guidance on this important and frequently recurring issue.

**1. The Third, Eighth and D.C. Circuits hold, both before and after *Sandin*, that *Hewitt* controls administrative placement decisions because of the multivariate, predictive nature of the decision.**

The Third, Eighth, and D.C. Circuits have rejected prisoners' demands for more extensive process and have instead held that, because of the subjective and predictive nature of the underlying decision, *Hewitt* provides the appropriate benchmark.

The Third Circuit explained why *Hewitt* controls in predictive assessment cases in *Mims v. Shapp*, 744 F.2d 946, 953 (3d Cir. 1984), and reaffirmed that view post-*Sandin* in *Shoats v. Horn*, 213 F.3d 140, 144–146 (3d Cir. 2000). In both cases, prisoners were assigned to conditions every bit as severe as those at OSP, based on security concerns, for periods of five and nine years respectively. *Mims*, 774 F.2d at 948–949; *Shoats*, 213 F.3d at 142–144. In both cases, the court concluded that *Hewitt* provided the due process



framework. As the court explained in *Mims*, in making these administrative placement decisions, prison officials must rely on "'purely subjective evaluations and on predictions of future behavior,'" and such "decision[s] would not be materially assisted by a detailed adversary proceeding.'" 744 F.2d at 950–951 (quoting *Hewitt*, 459 U.S. at 474). Post-*Sandin*, the court reiterated that *Hewitt* controls, explaining that so long as the State provides the "same [procedural] opportunities as those given to the inmate in *Hewitt*," it has given "constitutionally adequate" process. *Shoats*, 213 F.3d at 145.

The D.C. Circuit used identical reasoning to similarly conclude that *Hewitt* controls in administrative segregation cases. The inmates bringing *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), and *Crosby-Bey v. District of Columbia*, 786 F.2d 1182 (D.C. Cir. 1986), were held in conditions almost identical to those giving rise to this case for extended periods of time. *Brown*, 131 F.3d at 166; *Crosby-Bey*, 786 F.3d at 1183, 1185. Like these Respondents, those prisoners were placed in those conditions to prevent additional disruption of prison operations. As the court noted in *Crosby-Bey*, however, in making those placement decisions, prison officials are "entitled to rely on 'purely subjective evaluations and on predictions of future behavior.'" *Id.* at 1184 (quoting *Hewitt*, 459 U.S. at 474). Moreover, such decisions are typically based on "general knowledge of prison conditions and tensions," facts that are "peculiarly within the grasp of prison administrators." *Id.* (internal quotations omitted). According to the court, such decisional factors were "singularly unsuited to proof in any highly structured manner," and thus *Hewitt* procedures were appropriate. *Id.* (quoting *Hewitt*, 459 U.S. at 477 n.9) (internal quotations omitted).

The D.C. Circuit relied on *Crosby-Bey* in its post-*Sandin* decision in *Brown* to reach the same conclusion that

*Hewitt* controls in administrative placement cases. 131 F.3d at 170–171. In doing so, it expressly rejected the prisoner's argument that "because his placement in administrative confinement was based on an express finding that he had assaulted a correctional officer, it was essentially disciplinary in nature, so that he is entitled to the more extensive procedural protections applied to disciplinary hearings in *Wolff*." *Id.* at 170. According to the court, "[p]rison officials may appropriately place an inmate in administrative segregation if she represents a threat to the institution's security," and where they have done so, *Hewitt*, not *Wolff*, provides the appropriate process due. *Id.* (internal quotations omitted).

In the Eighth Circuit, the prisoner-plaintiff in *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985), spent seven years in "austere and restrictive" confinement that impaired both his ability to earn good time credits and his parole prospects. *Id.* at 228; *Clark v. Brewer*, 578 F. Supp. 1501, 1505, 1508 (S.D. Iowa 1983). In concluding the *Hewitt* was the appropriate benchmark, the Eighth Circuit focused on the many matters to be considered in such decisions: "By necessity, the judgment of penitentiary officials in these types of situations will not be easily measured in objective terms. Instead, their determination must often of necessity be based upon many 'imponderable' factors which necessarily take into account 'purely subjective evaluations and . . . predictions of future behavior.'" *Clark*, 776 F.2d at 235 (quoting *Hewitt*, 459 U.S. at 474) (ellipsis in original). The court noted that "unlike a . . . disciplinary hearing, the determination to be made, while involving a certain amount of objective factfinding, is primarily focused on subjective evaluations and predictions of future behavior. This type of hearing is singularly unsuited for proof in any highly structured manner." *Id.* at 235 (quoting *Hewitt*, 459 U.S. at 477 n.9)



(internal quotations omitted). And, while this was a pre-*Sandin* case, there is no indication that the Eight Circuit has altered that stance after *Sandin*.

Each of those circuits focused on a single dispositive factor: the nature of the decision to be made. Each recognized that, under the general due process framework in *Mathews*, *Hewitt* established appropriate procedures where the prison official's decision being challenged resulted from a forward-looking exercise of subjective judgment based on a wide variety of factors. These circuits also realized that the decisions at issue in those cases—the same type of placement decision giving rise to this case—were predictive, subjective and based on multiple factors. Thus, each concluded that *Hewitt* is the appropriate benchmark.

**2. The Sixth and Ninth Circuits hold that *Sandin* requires that *Wolff*, rather than *Hewitt*, controls the "what process is due" question for predictive placement decisions.**

In sharp contrast, the Sixth and the Ninth Circuits have concluded that *Hewitt* no longer controls such cases. According to those courts, *Sandin* has changed the standards for determining the process due in prisoner cases. These courts hold that, just as *Sandin* rejected *Hewitt* on the issue of whether a liberty interest exists, so too did *Sandin* reject *Hewitt's* formulation of the process due. In particular, both circuits have required States to hold *Wolff*-type proceedings, rather than informal *Hewitt* hearings, for predictive placement decisions.

Before the decision below, the Ninth Circuit was the sole outlier on this issue. Although it had previously held that *Hewitt* set the standard for equivalent placements, see

*Toussaint v. McCarthy*, 801 F.2d 1080, 1099–1101 (9th Cir. 1986), it changed direction in *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996).

*Keenan* arose from an inmate's challenge to the process given him before he was transferred to restrictive conditions to prevent future breaches of prison security. *Id.* at 1087–1088. He claimed a right to call his own witnesses and confront those testifying against him, rights not provided under *Hewitt*. *Id.* at 1088.

Because *Sandin* issued while *Keenan* was on review, the Ninth Circuit remanded to the district court for a new determination of whether Keenan had a liberty interest, and, if so, whether he had received all of the process due. In doing so, however, the Ninth Circuit expressly instructed the lower court that, if it found a liberty interest in the placement, Keenan was entitled to "all of the process he was due under *Wolff*." *Id.* at 1089. While that procedural regimen had been expressly rejected in *Hewitt* as inappropriate for predictive placement decisions, 459 U.S. at 474, the Ninth Circuit reasoned that *Sandin* had revived *Wolff*. In particular, since *Sandin* included statements about returning to the due process principles outlined in *Wolff*, the Ninth Circuit interpreted those statements to mean that full *Wolff* protections were necessary whenever official action deprives a prisoner of a post-*Sandin* liberty interest. *Keenan*, 83 F.3d at 1089. The court did not address, however, the fact that the *Sandin* discussion of *Wolff* took place solely in the context of determining *whether* a liberty interest existed; *Sandin* did not even address, let alone decide, any issues regarding what process is due when such a liberty interest exists. See Pet., *infra*, at 18–19.

The decision below reached the same result through similar, *Sandin*-based, logic. It too read *Sandin* as changing not only the test for determining the existence of a liberty



interest, but also the calculus for determining what process is due if such an interest exists. "*Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations but also the mechanistic fashion in which they" applied pre-*Sandin* precedents on what process is due. *Austin*, 372 F.3d at 357, App. 18a. In particular, the panel majority perceived *Sandin* as requiring two changes.

Most prominently, it held that *Sandin* requires that the private interest factor be given much greater weight in the *Mathews v. Eldridge*, 424 U.S. 319 (1976), calculation for determining the process due. "After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake." *Austin*, 372 F.3d at 357, App. 18a. And under its reading of *Sandin*, "[a]ny liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due." *Id.* at 359 n.12, App. 22a.

The Sixth Circuit also discounted the relevance of the nature of the underlying decision. "It is not enough to say that a particular decision is 'forward-looking'; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance." *Id.* at 357, App. 18a–19a.

Consequently, the Sixth Circuit, like the Ninth, required *Wolff*-type proceedings and, indeed, imposed procedural requirements that went beyond *Wolff*. For example, it required prison officials to (1) provide the inmate an "exhaustive list of the reasons to be considered for placement and a summary of the evidence to be presented," (2) allow the inmate to "present witnesses and documentary evidence

at classification hearings," and (3) maintain a record of the proceedings, all procedural requirements that it characterized as "closely track[ing] *Wolff*." *Id.* at 358, App. 20a. Then, going beyond *Wolff*, it also required the prison to make changes to the policy for appealing the classification decision. *Id.*

Hence both the Sixth and Ninth Circuits have held that *Sandin* has trumped *Hewitt's* focus on the nature of the underlying decision. As a result, both circuits have required *Wolff*-type proceedings for predictive placement decisions.

### 3. The Second Circuit has *said* that *Hewitt* controls, but it has adopted stricter procedural requirements for administrative placements than *Hewitt* compels.

Adding to the confusion, the Second Circuit has stated that *Hewitt* controls, but it has actually required greater process than *Hewitt* compels. In *Taylor v. Rodriguez*, 238 F.3d 188 (2d Cir. 2001), a prisoner was placed in very restrictive confinement for more than two years because his involvement with a prison gang was perceived to be an ongoing threat to security. *Id.* at 190. That action was presumed to implicate a liberty interest under *Sandin*, and thus the court faced the "what process is due" question. The court *said* that for challenges to placements predicated on administrative (as opposed to punitive) reasons, all that is necessary is "'some notice of the charges against [the prisoner] and an opportunity [for him] to present his views to the prison official charged with deciding whether to transfer him to administrative segregation.'" *Id.* at 192 (quoting *Hewitt*, 459 U.S. at 476).

But, in addressing the details of what was required, the court expressly adopted the more elaborate notice standard announced in *Wolff*. *Id.* ("Case law has not expressly set out



what is to be included in a notice with respect to administrative segregation, but since such standards have been articulated with respect to disciplinary segregation [in *Wolff*], we see no reason to establish separate standards for each."). Thus, in administrative segregation cases, the Second Circuit seems to straddle the fence.[2]

* * *

In sum, the decision below deepens an existing circuit split over what process is due before a prisoner is placed in supermax-type conditions for preventive reasons. Three circuits hold, both before and after *Sandin*, that *Hewitt* controls because of the great similarity between its prospective focus and the predictive nature of supermax placements. Two circuits hold that *Sandin* trumps that approach. One circuit is somewhere in the middle. Those disparate approaches cannot be reconciled, and only this Court can determine which is correct.

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[2] In prison liberty interests contexts other than the administrative segregation context, the Second Circuit has adopted the position advocated by the Third, Eighth, and D.C. Circuits (and the position we urge here). Namely, "the procedures required by *Wolff* apply if the restraint on liberty is imposed for disciplinary reasons; if the restraint is for 'administrative' purposes, the minimal procedures outlined in *Hewitt* are all that is required." *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001) (citing *Soto v. Walker*, 44 F.3d 169, 172 & n.3 (2d Cir. 1995)); see also *Matiyn v. Henderson*, 841 F.2d 31, 34 (2d Cir. 1988).

## B. The Sixth Circuit's decision conflicts with this Court's precedents on the process due when state action implicates a prisoner's liberty interest.

In addition to exacerbating the confusion among the Circuits, the decision below also warrants certiorari for another reason; it contradicts this Court's holdings in two respects. First, it reads too much into *Sandin* and its impact on *Hewitt*. Second, it gives too little consideration to the nature of the decisions giving rise to this case, thereby conflicting with *Hewitt*'s holding regarding the process due for predictive decisions, a holding that remains intact even after *Sandin*.

### 1. The Sixth Circuit erred in concluding that *Sandin v. Connor* changed the process due prisoners deprived of liberty interests.

Nothing in *Sandin* supports the Sixth Circuit's conclusion that that decision "called into question . . . [the] fashion in which [courts] applied the *Hewitt/Wolff* dichotomy" for determining the process due a prisoner. *Austin*, 372 F.3d at 357, App. 18a. *Sandin* expressly stated that it did not overturn either *Wolff* or *Hewitt* on the issue of how much process is due, and none of this Court's other precedents suggest that *Sandin* should be so interpreted.

In fact, *Sandin* tells us nothing about the amount of process due a prisoner deprived of a state-created liberty interest. The question presented there dealt exclusively with the *existence* of a liberty interest and therefore did not encompass questions about the procedures required when such an interest exists. *Sandin*, 515 U.S. at 474; see also 1993 U.S. Briefs 1911 (Lexis/Nexis). It is not surprising, then, that the opinion made only passing reference to prior decisions about the process due in the face of a liberty interest, *Sandin*, 515 U.S at 478–479, and expressly stated that it was *not* overruling any prior case, *id.* at 483 n.5.



No subsequent decision of this Court casts *Sandin* in that light. *Sandin* has been cited five times, but none of those references had anything to do with the process due a prisoner deprived of a liberty interest. See *Overton v. Bazzetta*, 539 U.S. 126, 137 (2003); *McKune v. Lile*, 536 U.S. 24, 36, 37 (2002); *id.* at 54 (O'Connor, J. concurring); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 278, 283 (1998); *Young v. Harper*, 520 U.S. 143, 148 (1997); *Lewis v. Casey*, 518 U.S. 343, 352 (1996); *id.* at 385 (Thomas, J. concurring). The Sixth Circuit was simply wrong to read so much into *Sandin*.

### 2. The decision below conflicts with this Court's holdings that require a focus on the prospective or retrospective nature of the decision in deciding what type of process is due.

The Sixth Circuit's holding that "[i]t is not the nature of the decision which strikes the due process balance," *Austin*, 372 F.3d at 357, App. 18a–19a, flies in the face of multiple precedents establishing that the type of elaborate procedures ordered here simply do not work when officials must make subjective, predictive decisions based on a multiple factors.

This Court has repeatedly declared that the nature of the underlying decision is a key factor in the Due Process equation. In fact, *Mathews v. Eldridge*, the seminal case in this area, called it "[c]entral to the evaluation of any administrative process." 424 U.S. at 343. Of particular import here, the Court has consistently distinguished between retrospective, fact-specific decisions and predictive, subjective decisions that are based on multiple factors. The Court has repeatedly concluded that procedures appropriate to the former are ill-suited for the latter.

That functional distinction plainly appears in *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). There, the Court faced a due process challenge to an administrative decision expelling a student from public school on academic grounds. The Court expressly differentiated decisions "rest[ing] on factual conclusions that [] individual students had participated" in specific acts of misconduct, from "subjective and evaluative" decisions about prospects for future success, decisions that "rested on the academic judgment of school officials." *Id.* at 89–90. It noted that "the determination whether to dismiss a student for academic reasons requires . . . evaluation of *cumulative* information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90 (emphasis added); see also *id.* at 91 n.6 ("[T]he school considers and weighs a variety of factors, not all of which, as noted earlier, are adaptable to the factfinding hearing."). The Court thus rejected procedures focused on finding historical facts about specific actions as counterproductive because "evaluations, which go far beyond questions of mere 'conduct,' are not susceptible of the same sorts of procedural safeguards that are appropriate to determining facts relating to misconduct." *Id.* at 95 n.5 (Powell, J., concurring).

Importantly, the Court has consistently made that same distinction in prison cases. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), rejected a call for *Wolff*-type procedures in parole hearings because "experience has shown, that the parole-release decision is . . . essentially an experienced prediction based on a host of variables," *id.* at 16, one that is "necessarily subjective in part and predictive in part," *id.* at 13, requiring consideration of what "the entire record shows," *id.* at 15. The Court therefore concluded that "[p]rocedures designed to elicit specific facts . . . are not necessarily appropriate." *Id.* at 14.



*Meachum v. Fano*, 427 U.S. 215 (1976), similarly rejected the contention that transfers made in response to disruptive conduct required *Wolff*-type hearings. According to the Court, such transfers are "made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security." *Id.* at 225.

Bringing the matter into even sharper focus, *Hewitt*, held that the very type of decision at issue here—a placement decision designed to limit problems related to a disruptive prisoner—is not aided by fact-specific procedures. In rejecting such procedures, the Court first noted the predictive nature of the decision: "The judgment of prison officials in this context . . . turns largely on purely subjective evaluations and on predictions of future behavior. 459 U.S. at 474 (emphasis added; internal quotations omitted). It also noted the many variables in the decision process: "[A]dministrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like," requiring officials to "predict not just one inmate's future actions . . . but those of an entire institution." *Id.*

The Sixth Circuit's decision cannot be reconciled with those precedents. The nature of a supermax placement decision is identical to the decision at issue in *Hewitt*. It requires "[d]iagnoses, prediction, risk assessment, and identification of causal factors" that "often defy objective criteria." Riveland, *supra*, at 9. But the panel majority gave that factor no consideration, and instead required procedures designed to determine different types of facts.

That approach simply does not work. Requiring *Wolff*-type procedures for those decisions degrades security for all who must live and work in Ohio's prisons. Review is urgently needed to address that harm.

### C. The circuit split on this issue has significant consequences for day-to-day prison operations.

This case presents more that an abstract doctrinal dispute. The positions taken by the Sixth, Second and Ninth Circuits put States in those circuits in an untenable position—everyday.

The States have an Eighth Amendment, and humane, duty to take affirmative action to neutralize the threats posed by dangerous inmates. But the ill-suited procedural requirements imposed by courts in these circuits make it very difficult, if not impossible, to meet that duty.

Nor is this an isolated problem. The types of decisions at issue here—determining which inmates must be separated from the general prison population to reduce violence—must be made thousands of times each year. *The Corrections Yearbook: Adult Corrections 2002* (Criminal Justice Inst., Inc. 2003) 46 (23,252 prisoners held in administrative segregation during 2001). And precedents from the Sixth, Second and Ninth Circuits have an inordinate impact on the nation's prisons. Those circuits contain almost half of the country's supermax beds, 37 percent of the nation's state prisoners, and 25 percent of all federal prisoners. *Supermax Housing*, *supra*, at 4 table 1; *Prison and Jail Inmates at Midyear 2003* (Bureau of Justice Statistics 2004), at 3 table 2; *Federal Bureau of Prisons Weekly Population Report* (September 30, 2004), available at http://www.bop.gov.

In short, the question presented here has significant safety implications for tens of thousands of state prisoners.



This Court should accept certiorari to vindicate the States' ability to meet these legitimate prison security concerns.

## CONCLUSION

For the above reasons, the Petition should be granted.

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OFFICE OF THE CLERK

No. ____

**In The Supreme Court Of The United States**

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REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**APPENDIX**

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# APPENDIX

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## TABLE OF CONTENTS


Page

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, June 10, 2004..... 1a

Appendix B: Order, United States District Court for the Northern District of Ohio, Eastern Division, May 15, 2002..... 36a

Appendix C: Opinion and Order, United States District Court for the Northern District of Ohio, Eastern Division, March 26, 2002..... 39a

Appendix D: Opinion and Order, United States District Court for the Northern District of Ohio, Eastern Division, February 25, 2002..... 47a

Appendix E: ODRC Policy 111-07 (Issued January 3, 2002)..... 122a




## APPENDIX A

Charles E. Austin et al., Plaintiffs-Appellees,
v.
Reginald Wilkinson et al., Defendants-Appellants.

372 F.3d 346 (6th Cir. 2004)

KAREN NELSON MOORE, Circuit Judge.

Plaintiffs-Appellees Charles E. Austin et al., n1 ("Inmates") all inmates at the Ohio State Penitentiary ("OSP") in Youngstown, Ohio, filed this § 1983 suit as a class action against Defendants-Appellants Reginald Wilkinson et al., n2 Ohio Department of Rehabilitation and Correction officials ("ODRC Officials"), alleging Eighth Amendment violations as well as procedural due process claims relating to their placement at the OSP facility, which is a supermaximum, or supermax, facility. A class was certified pursuant to Federal Rule of Civil Procedure 23(b)(2), and the Eighth Amendment claims, related primarily to medical care and the provision of outdoor recreation, were settled. The due process claims for declaratory and injunctive relief were then tried to the district court, which rendered a judgment for the Inmates and entered the injunctive orders at issue.

n1 The additional named plaintiffs are Robert Baksi, Michael Benge, Alonzo L. Bonner, August Cassano, David E. Clark, James DeJarnette, Roy D. Donald, David Easley, Brian K. Eskridge, Keith Gardner, Roger Lee Hall, Frederick O. Harris, Jr., Daryl Heard, Edward O. Hodge, Orsino Iacovone, Kunta Kenyatta, Stacy Lane, James D. Mitchell, Emanuel B. Newell, John W. Perotti, Lamar Preston, Jason H. Robb, Kevin B. Roe, Richard Siggers, Eric

Swofford, Lahray Thompson, Edward A. Tilley, and Mark Trawick.

n2 Named additionally as defendants are Stephen J. Huffman, Bernard J. Ryznar, Todd E. Ishee, Bruce A. Martin, Deborah Nixon Hughes, Cheryl Jorgensen-Martinez, Manish B. Joshi, Patrick F. Biggs, Audrey Sandor Nietzel, and Matthew Meyer.

On appeal, the ODRC Officials raise two claims of error: that the district court applied the wrong legal standards in finding a constitutional violation, and that even if a violation was correctly found, the remedial orders entered violate 18 U.S.C. § 3626, requiring particularized fact-finding by federal district courts interfering with state prison practices. Because we conclude that the district court did not err in determining that a liberty interest existed in the prison placement at issue and in modifying the procedures that govern that placement, we **AFFIRM** that portion of the district court's judgments; because the district court erred, however, in modifying substantive Ohio prison regulations, we **REVERSE AND REMAND** that portion of the judgments.

## I. BACKGROUND

In May 1998, the OSP, Ohio's supermax prison facility, opened for business. Supermax facilities, in operation in most of the states and in the federal prison system, represent an attempt to concentrate the "worst of the worst" in one facility, thereby making the rest of the general prison population more safe and easier to control. Ohio's supermax, which is designated a high-maximum-security prison, was built in response to an April 1993 riot at the Southern Ohio Correctional Facility ("SOCF"). Prior to the construction of



the 504-bed OSP, Ohio's most secure prison was the SOCF, a maximum-security prison. Within the SOCF is an even more secure cellblock, the J-1 cellblock, which houses twenty cells. Before the OSP opened, Ohio did not fill the J-1 cells; instead, it did not have enough maximum-security cells to house inmates at that security designation. From these facts, the district court concluded that the surplus of high-maximum-security cells led to a "because we have built it, they will come" mentality, with the surplus of maximum-security inmates leading to placement of inmates at OSP who did not meet the high-maximum-security requirements, contrary to both corrections policy and constitutional norms. *See Austin v. Wilkinson* (*Austin I*), 189 F. Supp. 2d 719, 724 (N.D. Ohio 2002).

When the OSP first received inmates in May 1998, it did so in a concededly problematic and confused manner. Appellants' Br. at 11. On August 31, 1998, the department "attempted to establish some predictability to placement at the OSP by issuing Department of Rehabilitation and Correction Policy 111-07"; the version of this policy in effect when the Inmates filed their complaint ("old 111-07") became effective January 28, 1999. *Austin I*, 189 F. Supp. 2d at 727. Placement at the OSP was synonymous with inmate classification at a high-maximum-security level. Old 111-07 provided for a classification committee (made up of a deputy warden and a mental health professional from the inmate's current institution, and a third official designated by the warden), which would receive a written statement from the prisoner as well as information provided by staff, and make a recommendation to the warden. The warden then approved or disapproved the recommendation, and sent the information along to the Bureau of Classification ("Bureau"). Even if both the classification committee and the warden agreed that high-maximum-security classification was inappropriate for

an inmate the Chief of the Bureau could still assign the inmate to OSP. Placement at OSP renders an inmate ineligible for parole during his time there. *Austin I*, 189 F. Supp. 2d at 728.

Under this policy, though, problems continued. Some of the more troubling instances of this haphazard system occurred when the Bureau would, without stating its reasons, overrule the recommendation of both the classification committee and the warden and either place or maintain the placement of an inmate at OSP; when inmates who would otherwise be recommended for parole were ineligible because of a suspect OSP placement; when multiple jumps in security levels happened as a result of a single incident; when decisions were made with little factual support; and when decisions were based solely on the use or smuggling in of small amounts of drugs. *Id.* at 734-36.

The goal of the OSP, to separate the most dangerous prisoners from the rest of the prison population, is achieved primarily through solitary confinement, of a type noticeably different than segregation at other Ohio prisons. Inmates at OSP spend twenty-three hours a day in their single cells, measuring approximately 89.7 square feet. *Id.* at 724. These cells are further isolated from the outside world by the installation of metal strips on the bottom and sides of the cell doors that prevent inmates from communicating with one another. *Id.* During the one hour per day that inmates can leave their cells, they have access to two indoor recreation rooms; most inmates have recreation alone, although a limited number may have recreation with one other prisoner. *Id.* Inmates having visitors are required to be strip-searched when they leave and reenter the cellblock, even though they are isolated from their visitors by solid windows. *Id.* at 725. Additional factual findings by the district court differentiate



life at OSP from segregation conditions at other Ohio prisons, including extra limitations on personal property rights, access to telephones and counsel, outside recreation, and communication with other persons. *Id.*

On January 1, 2001, the Inmates filed their complaint, stating both procedural due process claims regarding placement at OSP, the claims at issue on appeal, and Eighth Amendment claims regarding inadequate medical and psychiatric care, inadequate outdoor recreation facilities, and harsh restraints used at OSP. The Eighth Amendment claims were settled below. *See Austin v. Wilkinson*, 2002 U.S. Dist. LEXIS 27439, No. 4:01-CV-71 (N.D. Ohio Apr. 5, 2002) (order approving settlement agreement). A Fed. R. Civ. P. 23(b)(2) class was certified, and the case was scheduled for trial in January 2002. On the eve of trial, the ODRC released a new version of 111-07 ("new 111-07"), and it is the district court's ordered modifications to new 111-07, made after a bench trial, that are at issue on this appeal. In old 111-07, prisoners were classified as high-maximum-security and maximum-security; in new 111-07, the security levels are instead level five and level four. When the district court issued its decision, only level five prisoners were housed at OSP, but the appellees urge this court to take judicial notice of the decision by Defendant Wilkinson to house inmates classified at both levels four and five at OSP. Appellees' Br. at 5 n.1. New 111-07 details both the substantive reasons for reclassification and the procedures followed to reclassify, as well as the conditions imposed on inmates in those classification levels. n3 Various prison officials are empowered to initiate placement into classification level five, n4 using the "Security Designation Long Form," which provides a score sheet for inmates based on their age, the severity of the offense triggering the initiation of reclassification hearings, prior prison experience, prior

violent behavior, pre-prison gang activity, and escape attempts; the prison official is also empowered to override the numerical score for any of the reasons identified by 111-07 as grounds for level five classification. These include assaultive and/or predatory behavior; the nature of the inmate's conviction; leadership roles in riots or disturbances; the possession of contraband; the identification of the inmate as a leader of a "security threat group" (prison gang); escape attempts; "an ability to compromise the integrity of [prison] staff"; knowing exposure of others to HIV or hepatitis; or a chronic inability to adjust to a lower security level. On initiation of the reclassification, the warden establishes a classification committee to review the inmate's behavior and determine whether in fact the inmate meets one of the level five criteria. That committee is to hold a hearing to review the form and any other relevant information; 111-07 entitles inmates to forty-eight hours' prior notice of that hearing and the opportunity to appear and make both oral and written presentations. The classification committee is to "document information" presented by staff and the inmate, and determine whether the inmate should be placed in level five. That recommendation is then forwarded to the warden. If the warden approves the recommendation, both the recommendation and the approval are forwarded to the Bureau of Classification for final decision. (If the warden does not approve the recommendation, the process ends and the inmate is not classified as level five). The inmate shall be notified of the warden's approval, and may file a formal objection with the Bureau within fifteen days of notice. The Bureau will then review the recommendation and any objection and make a final decision. Additionally, within thirty days of placement at OSP, the OSP staff reviews a reclassified inmate's placement, and if they recommend a security reduction with which the OSP warden agrees, that recommendation is sent to the Bureau. Review of OSP



inmates' security levels is made at least annually and follows essentially the same process as the initial classification hearing.

n3 The procedural information and quoted language are taken from new 111-07.

n4 When the district court made its findings and decision, only prisoners classified as level five were placed at OSP. As noted above, this is no longer the case, as the ODRC is now placing level four prisoners at OSP. The procedure for placement at level four is essentially the same as that set out in new 111-07 and found constitutionally inadequate by the district court. Therefore, inmates are being placed at OSP without the procedural protections ordered by the district court. Because the complained-of deprivation of liberty is not reclassification by itself, but placement at OSP which results from a level five classification, this seems a particularly disingenuous way to evade the district court's order in advance of appellate review.

In its opinion, issued on February 25, 2002, the district court found the process specified in new 111-07 lacking. *See Austin I*, 189 F. Supp. 2d at 750-52. The district court identified the following deficiencies: that inmates are not given notice of all the evidence that may be relied upon in their classification hearings; that inmates are not allowed to call witnesses; that the placement criteria give insufficient notice of the amount of drugs in possession that would trigger level five placement; that the placement criteria are unnecessarily vague with regard to the gang activity that would trigger a placement; that the final decisionmaker, the Bureau of Classification, was not required to describe the facts found and reasoning used in making its placement and

reclassification decisions; that the inmate is not given adequate notice of the information to be considered at his reclassification hearing; and that adequate notice of the conduct necessary for the inmate to leave the OSP is not given. The district court then ordered the parties to file proposed injunctive orders; the ODRC Officials' proposed injunctive order was one and a half pages in length. On March 26, 2002, the district court issued an injunction directing the ODRC Officials to correct each of the deficiencies it had found and issued an accompanying judgment terminating the action under Rule 58. *See Austin v. Wilkinson* (*Austin II*), 204 F. Supp. 2d 1024 (N.D. Ohio 2002). The ODRC Officials filed a timely notice of appeal on April 17, which was docketed as Sixth Circuit Appeal Number 02-3429. On April 24, they filed with the district court a revised version of 111-07 ("revised 111-07"). On May 15, the district court ordered that policy adopted with slight changes. On June 6, 2002, the ODRC Officials filed a Rule 60(b) motion, n5 which the district court denied on July 12, ruling that the defendants were not surprised by its judgment, and that it had the authority to order the injunctive relief at issue. On July 12, the ODRC Officials filed a notice of appeal from both the district court's denial of their Rule 60(b) motion and its May 15 order adopting revised 111-07, n6 docketed as Appeal No. 02-3816.

n5 The ODRC Officials asked for relief under Rule 60(b)(6), (b)(1), and (b)(4).

n6 The ODRC Officials had moved on June 6, 2002, simultaneous with their Rule 60(b) motion, for additional time to file a notice of appeal from the district court's May 15 order. An extension was granted to July 15, 2002, pursuant to Federal Rule of Appellate Procedure 4(a)(5).



## II. ANALYSIS

### A. Jurisdiction

The underlying civil rights action was brought under 42 U.S.C. § 1983. The district court had original jurisdiction under 28 U.S.C. § 1331. This court has jurisdiction under 28 U.S.C. § 1291.

### B. Standard of Review

The ODRC Officials appeal from the grant of a permanent injunction and the denial of a motion for relief from the judgment, both of which are reviewed for abuse of discretion. *See Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 317 (6th Cir. 2001); *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991). In determining whether the district court abused its discretion, we give great deference to the district court, reviewing its legal determinations de novo, but only disturbing its factual findings if they are clearly erroneous. *Elec. Workers Pension Trust Fund of Local Union # 58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003).

### C. Due Process Rights

#### *1.* Liberty Interest under *Sandin v. Conner*

Inmates challenge the procedures for classification at level five under the Due Process Clause of the Fourteenth Amendment, claiming that classification at that level and concomitant placement at OSP implicates a state-created liberty interest, and that the procedures in place before trial were inadequate to protect this interest. Therefore, our threshold inquiry is whether a state-created liberty interest

exists with regard to placement in Ohio's supermax prison. This inquiry is controlled by *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), which mandates that a state creates a liberty interest in avoiding certain prison conditions only where those conditions are an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. Prior to *Sandin*, a state created a liberty interest through using "'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.'" *Id.* at 480 (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983)). *Sandin* shifted the focus from parsing the language of state statutes and regulations to examining the severity of the conditions to which an inmate would be subject.

The district court thus properly made factual findings as to the conditions in OSP compared to the conditions in other Ohio prisons, specifically in the segregated units of maximum-security prisons, the most severe non-OSP conditions in the Ohio system. The court found that the extreme isolation visited upon the inmates at OSP, the lack of any outdoor recreation, the limitations upon personal property rights and access to telephones and counsel, and, finally, the ineligibility of OSP inmates for parole, all combined to create a significant and atypical hardship. The ODRC Officials' sole challenge on appeal to these careful findings is that the district court erred by comparing conditions at OSP to conditions at other Ohio prisons. They argue instead that the proper baseline in determining atypicality is the conditions at other supermax facilities around the country. Other circuits that have decided the question have split over whether the proper control group is the general prison population or inmates in typical segregation conditions. *Compare Beverati v. Smith*, 120 F.3d



500, 504 (4th Cir. 1997) (finding "the conditions [at issue] were more burdensome than those imposed on the general prison population" although not sufficiently atypical), *and Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) ("a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing"), *with Griffin v. Vaughn*, 112 F.3d 703, 708 (3d Cir. 1997) (administrative custody is not "extraordinary" and "stays of many months are not uncommon"), *and Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) (explicit factual comparison between administrative segregation and disciplinary segregation is necessary). *See also Hatch v. District of Columbia*, 337 U.S. App. D.C. 266, 184 F.3d 846, 847 (D.C. Cir. 1999) (appropriate comparison is "the most restrictive conditions . . . routinely imposed on inmates serving similar sentences"); *Wagner v. Hanks*, 128 F.3d 1173, 1177 (7th Cir. 1997) (appropriate comparison is to the conditions of nondisciplinary segregation in the state's most restrictive prison). n7 None of the courts of appeals, however, have adopted the novel and restrictive control group urged by the ODRC Officials, which would as a matter of law make it impossible for any inmates but those in the most harsh prison in the country to make out a case for protection under *Sandin*.

n7 The Fifth Circuit has also remanded at least one case to a district court with instructions to determine the proper baseline if *Sandin* is triggered. *See Wilkerson v. Stalder*, 329 F.3d 431, 436 (5th Cir. 2003). *But see Orellana v. Kyle*, 65 F.3d 29, 31-32 (5th Cir. 1995) ("it is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional 'liberty' status"). *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997),

cited by the district court, does not in fact analyze state-created liberty interests under *Sandin*, but instead evaluates fundamental liberty rights under the three-strikes provision of the Prison Litigation Reform Act ("PLRA"). -

The ODRC Officials point only to the Supreme Court's decision in *Olim v. Wakinekona*, 461 U.S. 238, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983), and dicta in *Wagner*, 128 F.3d at 1173, to support their argument. *Olim* involved a challenge to an interstate prison transfer; the Court held that no liberty interest was created by Hawaii state prison regulations, and that the Due Process Clause of its own force did not protect any liberty interest deprived by an interstate prison transfer. *Olim*, 461 U.S. at 245-49. But *Olim*'s holding has limited applicability when dealing with a state-created liberty interest; that the Due Process Clause does not of its own force protect against interstate transfers has little to do with whether Ohio regulations create a liberty interest in remaining outside of a supermax prison. *Sandin* requires a situationally-based factual analysis; if it is *typical* that an Ohio prisoner experiences conditions similar to those of OSP, then state lines might truly be irrelevant. That, however, is not the case; of 44,000 prisoners in the Ohio system, only twenty to thirty have been transferred out of state—a number that itself might give rise to *a*typicality, if not hardship, if substantive state law limiting officials' discretion in transfer existed—and not a single one has been shown to have been transferred to a supermax. *See Hatch*, 184 F.3d at 857 ("What matters, therefore, is not simply the possibility of transfer but also its *likelihood*."). *Olim*, to the contrary, relied heavily on the fact of interstate transfer as a common occurrence, suggesting that no reasonable expectation existed that any particular inmate would serve his sentence within his state of conviction. *Olim*, 461 U.S. at



245-47. Even if the proper comparison in this case were nationwide rather than statewide, the appropriate question would be whether the OSP represented an atypical hardship as compared to, at most, the typical conditions in administrative or disciplinary segregation to which transferred Ohio prisoners are subject, not those in supermaxes. Finally, *Wagner* is not to the contrary. First, as the Inmates point out, the language relied upon by the ODRC Officials in support of their claim is dicta. *See Wagner*, 128 F.3d at 1176. Second, and more important, the *Wagner* court itself in its analysis misses the important distinction between cases narrowly defining the contours of the protection of the Due Process Clause of its own force and those deciding when state laws create a liberty interest. The Supreme Court has repeatedly held that transfers in and of themselves do not implicate due process interests (although it has not to date dealt with transfer to a supermax prison), *see Olim*, 461 U.S. at 238; *Meachum v. Fano*, 427 U.S. 215, 229, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976), but the Court has never held that state laws cannot *create* a liberty interest in avoiding a transfer to a particularly harsh facility. This key distinction goes wholly unaddressed by the ODRC Officials. n8

n8 This distinction also partially explains why *Moore v. Litscher*, 52 Fed. Appx. 861, 2002 WL 31805012 (7th Cir. 2002), and *Nash v. Litscher*, 50 Fed. Appx. 317, 2002 WL 31444476 (7th Cir. 2002), cited by the concurrence for the proposition that avoidance of placement at a supermax is not in and of itself a liberty interest under *Sandin*, are inapposite. *Moore* cited to *Olim* in holding, "Prisoners do not have a federally protected liberty interest in being housed in a particular facility." 52 Fed. Appx. 861, [WL] at *1. With respect to a state liberty interest, the court held that "a failure to comply with state procedural rules does not violate the

federal constitution." *Id.* The *Moore* court failed to partake in any analysis under *Sandin*, and the case cannot stand for the proposition that placement at a supermax could not implicate a liberty interest created by the state. *Nash* noted simply that "Nash does not have a liberty interest in his prison placement," and cited to an earlier case, *Whitford v. Boglino*, 63 F.3d 527, 532 (7th Cir. 1995). 50 Fed. Appx. 317, [WL] at *2. *Whitford* held that no federal interest existed in prison placement, and that Illinois state regulations, so far as the court "understood," did not create such a liberty interest. *Whitford* also dealt with transfer to a maximum security prison, rather than a supermax. All three of these cases, *Whitford*, *Moore*, and *Nash*, were argued pro se in the Seventh Circuit. We do not think they can stand for the proposition that careful factual findings in the district court demonstrating severe hardship in prison conditions, atypical in a prison system, can never rise to the level of a protected liberty interest without a parole deprivation.

Ultimately, whether OSP is compared to the general prison population of Ohio, or instead to inmates in typical segregation conditions, which was the baseline used by the district court, OSP constitutes an atypical and significant hardship under *Sandin*, such that inmates enjoy a liberty interest in not being placed at OSP absent the state-mandated substantive predicates set out in new Policy 111-07. It is therefore unnecessary to determine which is the proper baseline for *Sandin* comparisons in order to decide this case, but we reject emphatically the ODRC Officials' argument that the baseline should be out-of-state supermax prisons. Whatever the "ordinary incidents of prison life" may encompass, they must be decided with reference to the particular prison system at issue, and can only be truly



"ordinary" when experienced by a significant proportion of the prison population.

### 2. The Process That Is Due

Once a liberty interest has been established under *Sandin*, we must turn to the question of what process is due to protect that interest. At issue on appeal is the propriety of a set of modifications made by the district court to the ODRC's policy governing classification at level five. Most of these modifications concern the procedures used to classify inmates, but three modifications are substantive predicates to OSP placement and retention. We will analyze the procedural modifications in greater depth below under the familiar due process analysis of *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), but the substantive modifications can be dealt with more simply.

#### a. Modifications to Ohio's Substantive Prison Regulations

Prior to the district court's modifications, inmates could be placed at OSP for any contraband activity, no matter how minimal. As its first substantive modification, the district court directed that the policy be rewritten to specify a quantity of contraband activity, and for drug activity, the district court stipulated that the threshold amount should "reflect a level that would subject an inmate to incarceration for at least a third degree felony," or alternately the court allowed "placement for multiple violations involving lesser quantities of drugs." *Austin II*, 204 F. Supp. 2d at 1028. The district court's second substantive modification was to the "security group threat" predicate for classification, directing the ODRC Officials to modify the criteria to require a greater showing of involvement in such groups. Third, the district

court required that only behavior in the five years prior to a retention decision should be considered, and that an inmate with three years free of violent behavior and two years free of major misconduct "should generally qualify for reclassification" to a lower level and transfer out of OSP, with an exception to both of these rules if an inmate's "prior conduct during incarceration resulted in death or extreme bodily harm." *Id.*

The power of the federal courts to order modifications in state prison policies extends only as far as is necessary to protect federal rights. The Inmates do not argue and we do not decide whether placement at OSP implicates either the Eighth Amendment or the substantive portion of the Due Process Clause. n9 The federal right at issue in this case, then, is defined solely in relation to the substantive limits placed on the discretion of the ODRC officials by state law itself. Therefore, the district court only had the power to order federally mandated process in a substantive inquiry otherwise governed by the state. The district court was thus without power to order the state officials to modify the substantive predicates which governed placement and retention at OSP. *See Washington v. Harper*, 494 U.S. 210, 219-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (reviewing a state court's substantive as well as procedural modifications to state correctional regulations). Therefore, regardless of their inherent soundness, these three modifications must fail, as they order the ODRC to alter its substantive rules governing OSP placement and retention.

n9 While the Inmates challenged certain conditions at OSP under the Eighth Amendment, claims that were settled below, they do not argue that either the Eighth Amendment or the substantive protections of the Due Process Clause create liberty interests in freedom from transfer to OSP that require due process protection. We express no opinion as to the viability of such a claim.



While the district court correctly identified adequate notice as a requirement of due process when making these changes, *see Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1104-05 (6th Cir. 1995), we conclude that each of the regulations provides sufficient notice and that the modifications made by the district court are in fact substantive modifications. For instance, new 111-07 states that any amount of drugs can trigger a reclassification hearing; altering the policy to require a specified amount does not improve upon that notice but instead limits the substantive discretion of the ODRC Officials. Similarly, the security group modification alters the substantive grounds for placement at OSP, rather than the process used in determining that placement. And the modification to the retention criteria also limits the substantive discretion of the Officials. While the due process requirement of notice applies in the prison context as well as outside of it, albeit slightly differently, *see United States v. Chatman*, 538 F.2d 567, 569 (4th Cir. 1976), any deficiencies in the notice provided by these provisions are properly corrected through case by case "as applied" challenges to the regulations, rather than striking the regulations down on their face. *See Parker v. Levy*, 417 U.S. 733, 755-56, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974); *Adams v. Gunnell*, 729 F.2d 362, 369-70 (5th Cir. 1984). We therefore reverse those portions of the district court's judgments that altered the contents of these three substantive regulations.

**b. Procedural Modifications**

That a liberty interest exists in avoiding classification at level five and concurrent placement in OSP is in many ways the easy half of the *Sandin* analysis. What is much less clear after *Sandin* is how to determine what process is due to protect that interest. Before *Sandin*, state-created liberty interests of prisoners were either protected by an adversary hearing on the record following *Wolff v. McDonnell*, 418 U.S. 539, 563-73, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), or a more free-form hearing following *Hewitt*, 459 U.S. at 477. *Wolff* dealt with the process due in finding a disciplinary infraction punished by the rescission of good-time credits; *Hewitt* involved a challenged placement in administrative segregation, pending the outcome of an investigation into misconduct. Cases following the *Hewitt/Wolff* split have classified various factual situations depending upon the category into which the challenged process fell: disciplinary or administrative, historical or prospective, objective or subjective, *Wolff* or *Hewitt*. On appeal, the ODRC Officials assert that this mechanical dichotomy still has force after *Sandin*, that classification at level five and placement at OSP is a forward-looking, *Hewitt*-type procedure, and that our inquiry should end there, with a decision that only "*Hewitt* process" is due. We are convinced, however, that *Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic fashion in which they applied the *Hewitt/Wolff* dichotomy. n10 After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake. It is not enough to say that a particular decision is "forward-looking"; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the



nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance. n11 With that in mind, we approve of the district court's grounding of its decision in the due process balancing test outlined in *Mathews v. Eldridge*, 424 U.S. at 335, and consider the procedural modifications in light of that test. *Mathews*

> requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.*

n10 Like Judge Rogers, we are convinced that the "*Hewitt/Wolff* dichotomy" is not a viable form of analysis; we note later that the district court's procedural modifications track *Wolff* only because the ODRC officials had argued that the district court went beyond *Wolff* in ordering certain modifications, most of which were directed at the "appellate" process created by the ODRC.

n11 We do not think that we differ so much from Judge Rogers in describing this balance; we agree that the type of decision being made will affect the private interest, the government interest, and the value of certain procedural safeguards. We only emphasize that

> the type of decision is not, as the ODRC Officials would have us hold, the only factor necessary to determine what procedure is due. We believe, however, that in the face of the substantial factual findings of the district court as to haphazard ODRC placements, the procedural requirement of notice is particularly important, and give great weight to its value in increasing accuracy.

The district court made fifteen specific modifications to new 111-07, including the improper substantive modifications dealt with above. A first set deals with the classification hearing itself, and closely tracks *Wolff*. First, when classification proceedings are initiated, the notice already stipulated by new 111-07 shall include an exhaustive list of the reasons to be considered for placement and a summary of the evidence to be presented. Second, the inmate shall be allowed to present witnesses and documentary evidence at classification hearings, where "permitting him to do so will not be unduly hazardous or burdensome to institutional safety or correctional goals." J.A. at 530 (citing *Wolff*, 418 U.S. at 566). Finally, a record is to be made of the proceeding itself, and if the ODRC wishes to rely on confidential witnesses, it must indicate that reliance and disclose as much of the confidential testimony as possible.

A second group of modifications required by the district court centers on the administrative appellate procedure laid out in new 111-07. Because no comparable appellate procedure was at issue in *Wolff*, *see* 418 U.S. at 565, these requirements do not track that case as closely. The district court found that the previous system of administrative review, in which each intervening appellate decisionmaker had plenary power to reverse the prior



decisionmaker without any statement of reasons for the decision given to the inmate, had led to suspect inmate classifications. The specific changes ordered by the district court were: that the inmate is to receive the classification committee's recommendation and notice of his right to and method of appeal; that the warden is to engage in "independent review" of the committee's recommendation, and if in doing so, relies upon a confidential witness statement not already made known to the prisoner, shall follow the procedure outlined above, including allowing the inmate to respond in writing; that the warden shall, if she approves the recommendation, send a copy of that recommendation to the inmate; and that the Bureau of Classification shall follow the same procedure in relying on new confidential witness statements, shall allow the inmate to submit documentary evidence, and will, if the inmate is recommended for level five placement, record a detailed and specific justification for the decision. Finally, the district court, in its May 15, 2002, order, required that none of the members of the original classification committee shall take part in the decision of the prisoner's appeal to the warden or to the Bureau.

The first factor of the *Mathews* balancing test, the private interest at stake, is significant; placement at OSP is indefinite and reviewed only annually, unlike placement in disciplinary segregation in the Ohio prison system, which lasts only thirty days, or administrative segregation, which is reviewed every thirty days. Prisoners placed at OSP are deprived of all significant human contact and have other restrictions placed upon their movement and their personal privileges; they are also ineligible for parole during their stay at OSP. In this first factor, *Sandin* affects the due process balance: because only those conditions that constitute "atypical and significant hardships" give rise to liberty

interests, those interests will necessarily be of a weight requiring greater due process protection. n12 As to the second factor, the risk of error, the district court made specific findings concerning past erroneous and haphazard placements at OSP, which go unchallenged on appeal. We will consider the probative value of particular procedures in the next paragraph. As to the third factor, the ODRC clearly has an interest in guaranteeing the safety of its staff and inmates through the swift isolation of dangerous inmates. However, the ODRC has a mechanism to assure safety, one which does not require extensive process, and which, unlike OSP placement, is easily and swiftly reversible in the case of error: administrative segregation.

n12 We mean by this statement only to compare those liberty interests found to exist post-*Sandin* with those found to exist pre-*Sandin*. Because the Court has made clear that many of the liberty interests found by courts which would have in the past required certain pre-deprivation processes are no longer viable liberty interests, in looking over what courts have required of prison officials in the past, it is important to remember that many liberty interests which required less process in the past would require no process now. Any liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due than those which may have been found pre-*Sandin*.

Looking at each of the modifications ordered by the district court individually, we remain unconvinced that the district court abused its discretion in finding that each procedural modification it made was mandated by the weighty private interest at stake and the risk of error and was unmitigated by the governmental interests at stake. We examine first the requirement identified by the ODRC



Officials both in their brief and at oral argument as the most burdensome: requiring officials to limit their placement decision to only those matters detailed in the notice given to the inmate. They argue that this requirement will constrict "substantive discretion" by disallowing reliance on "rumor, reputation, and even more imponderable factors." Appellants' Reply Br. at 8 (quoting *Hewitt*, 459 U.S. at 474). This argument is unavailing. Placement at OSP implicates a liberty interest because of the ODRC's own regulations limiting the substantive discretion of prison officials; they can place inmates at OSP only in the presence of certain factual predicates, all of which are historical in nature. Having set out a detailed and restricted list of reasons why inmates can be put at OSP, the ODRC cannot turn around and argue that the district court's order decreases their ability to rely on "rumor, reputation, and even more imponderable factors," for those factors are illegitimate under their own placement scheme. n13 The district court required that the "defendants will provide the inmate with written notice of all the grounds believed to justify his placement at level five and a summary of the evidence that the defendants will rely upon for the placement." *Austin II*, 204 F. Supp. 2d at 1026. We do not find that this requirement's burdens on the ODRC outweigh its probative and protective value.

n13 It is here we part ways with Judge Rogers—in determining what process is due, we believe reference to what the state substantively requires is the first step. In order to be placed at OSP, an inmate must fulfill one of those discrete, substantive historical predicates; the district court correctly required that ODRC Officials place an inmate on notice of what historical events will be used to demonstrate his fulfillment of one of those predicates. The state itself has limited its ability to place inmates at OSP; the

combing through files predicted by Judge Rogers is unlikely in the face of the specific substantive predicates identified in the state scheme.

Having found that the additional procedural requirement identified by the ODRC Officials as the most burdensome passes muster under *Mathews v. Eldridge*, we conclude that those which pose a lesser burden on the ODRC are also appropriate. The ODRC Officials, both in their brief and at oral argument, did not in fact point to any other single procedural requirement as being particularly burdensome. We note, moreover, that many of the procedures ordered by the district court are an attempt to reconcile an elaborate administrative appeals scheme created by the ODRC Officials with the requirement that the inmate know the reason for any decision made about his fate; where a higher-up decisionmaker reverses the decision of the original factfinder, a brief description of the grounds for that reversal is constitutionally necessary.

### D. Prison Litigation Reform Act

The ODRC Officials make a final argument that the district court failed to follow 18 U.S.C. § 3626, part of the Prison Litigation Reform Act ("PLRA"), governing prospective relief. Their complaints center around the substantive modifications made to new 111-07, which modifications are indeed invalid for the reasons discussed above. They also make a third, more general argument that the district court erred in failing to make findings that the remedial orders are necessary to correct "'current and ongoing' federal violations." Appellants' Br. at 60. But the "current and ongoing" language comes from § 3626(b)(3), governing the *termination* of relief, not from § 3626(a),



governing requirements for initial relief. This argument therefore has no merit.

## III. CONCLUSION

Because the Inmates have a liberty interest in avoiding placement at OSP, and because the procedural modifications ordered by the district court are necessary to protect that interest, we affirm ~~those~~ portions of the district court's judgments that address procedural requirements and modifications. Because the district court was without power to reach the substantive prison regulations which were also modified, we reverse the district court's judgments insofar as they rely on the following: Part II of the district court's March 26, 2002 order, excepting the final paragraph; n14 the penultimate paragraph of the district court's May 15, 2002 order; and the underlying portions of the district court's February 25, 2002 opinion. n15 We therefore partially **AFFIRM** and partially **REVERSE** the district court's judgments, and we **REMAND** to the district court for further proceedings consistent with this opinion.

n14 That paragraph concerns the procedural modification of departmental notice to the inmate of the inmate's progress towards reclassification, and is a proper procedural modification.

n15 The ODRC Officials appeal from the district court's July 12 denial of their Rule 60(b) motion; the only claims of error in that denial which they make on appeal concern the substantive modifications to 111-07 that we reverse in any case. There is therefore no need to evaluate the propriety of the district court's denial of the Rule 60(b) motion on its own merits.

## CONCURRING IN PART, DISSENTING IN PART

ROGERS, Circuit Judge, concurring and dissenting. While I agree with much of the majority's careful opinion, there are two areas where my analysis differs sufficiently to warrant a separate opinion, and one point upon which I respectfully dissent.

A.

I agree that the Inmates have shown a protected liberty interest under *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), and that in applying *Sandin* we are not required to make an interstate, as opposed to intrastate, comparison. The record shows that inmates assigned to OSP not only are subjected to far more severe conditions of confinement, but they are also disqualified for parole while assigned to OSP. These two factors together permit the conclusion that a liberty interest is implicated under *Sandin*.

Because assignment to the OSP involves disqualification from parole, it is unnecessary for us to decide whether a prison classification that subjects an inmate to more restrictive conditions of confinement, without more, constitutes a deprivation of a liberty interest. Recent unpublished opinions of the Seventh Circuit hold that it does not, even where assignment to a supermax prison was involved. *See Moore v. Litscher*, No. 02-1461, 52 Fed. Appx. 861, 2002 U.S. App. LEXIS 25305 (7th Cir. Nov. 27, 2002) (prisoners do not have a federally protected liberty interest in being housed in a particular facility, and therefore, as a matter of federal constitutional law, prisoner was not entitled to any due process protection before he was moved to supermax facility); *Nash v. Litscher*, 50 Fed. Appx. 317



(7th Cir. 2002) (same). If movement from one level of restrictive confinement to a significantly higher one triggers due process protections, then prison administration could be unduly burdened by the necessity of due process hearings. Courts would then have to struggle with just how much of a change in the severity of confinement triggers due process protection. Fortunately, we do not need to decide the issue. In this case, the decision to assign an inmate to OSP not only imposes extraordinarily strict conditions, but also suspends parole eligibility. While Ohio law does not create a liberty interest in parole, *see* Ohio Rev. Code § 2967.03; *Wagner v. Gilligan,* 609 F.2d 866, 867 (6th Cir. 1979), a parole eligibility determination can indirectly affect the length of a prisoner's incarceration, and is patently based on factors beyond the consideration of prisoner safety and prison management. *See* Ohio Admin. Code § 5120:1-1-07 (2004); *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456, 2002 Ohio 6719, 780 N.E.2d 548, 555 (Ohio 2002) (emphasizing that parole board may "consider any circumstances relating to the offense or offenses of conviction, including crimes that did not result in conviction, as well as any other factors [it] deems relevant").

Even though assignment to a very restrictive prison might not by itself amount to a deprivation of a liberty interest, and even though a suspension of parole eligibility by itself may not amount to the deprivation of a property or liberty interest in Ohio, the combination of the two deprivations, in the context of the facts shown in the record of this case, amounts to a deprivation of a protected interest for procedural due process purposes. *See Sandin*, 515 U.S. at 487 (finding no protected liberty interest in remaining free from disciplinary segregation, but noting that disciplinary record did not preclude parole); *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) (finding that stigmatizing

consequences of labeling inmate as "sex offender," combined with parole ineligibility for non-completion of mandatory treatment program, triggered due process protections under *Sandin*). By way of analogy, the Supreme Court found a protected interest in *Owen v. City of Independence*, 445 U.S. 622, 633 n.13, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980), from the combination of a loss of at-will employment (alone not a property interest under *Board of Regents v. Roth,* 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)) and defamatory statements (alone not a deprivation of a liberty interest under *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)).

B.

I also agree that the proper framework for evaluating whether the state procedures meet the requirements of procedural due process is the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-45, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). Such an analysis requires that each procedural protection sought for each category of administrative decisionmaking be evaluated independently under the *Eldridge* factors. We are not required to adopt for any prison-related decision the bundle of procedures required by one or another Supreme Court case dealing with different types of prison decisions. Thus discussion of the *Hewitt/Wolff* "dichotomy" is problematic. Many deprivations of liberty interests in prison, and certainly the ones in this case, are different in important respects both from the disciplinary rescission of good-time credits in *Wolff v. McDonnell*, 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), and from the administrative segregation in *Hewitt v. Helms*, 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). The sought procedures may also vary. In short, the balance has to be context-specific. Thus whether or not a



particular procedure imposed by the district court "tracks *Wolff*" by itself does not tell us whether it is required by *Eldridge*. On the other hand, of course, the Supreme Court's analysis with respect to what procedures are required to protect a particular liberty interest do provide guidance where the procedures or the interests are in relevant respects analogous. Thus to the extent, for instance, that *Hewitt* instructs that additional procedures with respect to "forward-looking" determinations are less likely to increase the accuracy of such decisions (the second *Eldridge* factor), 459 U.S. at 473-74, that guidance may appropriately be applied--not categorically but as part of the weighing--in other cases involving different procedures and different liberty interests.

I would also qualify the majority's statement that "it is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance." The *Eldridge* balance involves three factors, two of which can be characterized as "the nature of the interests on both sides." The other, often dispositive factor, however, is the degree to which the desired procedures will increase the accuracy of agency decisionmaking. That determination often does depend on "the nature of the decision" in the sense that some types of decisions will be greatly benefited by certain procedures, while others may not.

C.

Applying the *Eldridge* analysis, I would uphold all of the procedural requirements imposed by the district court except the requirement that officials limit their placement decision to those matters detailed in the notice to the inmate. n1

n1 I agree that the substantive requirements must be reversed, for the reasons stated in Part II(C)(2)(a) of the majority opinion.

At the outset, I note that our scope of review is de novo for legal issues such as whether procedural due process requires certain procedures, even though the issue is presented on appeal from the entry of an injunction. *See Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 381 (6th Cir. 2001) ("A court abuses its discretion when it relies on clearly erroneous findings of fact, applies an inappropriate legal standard, or improperly applies the law, with such legal questions receiving de novo review in the Court of Appeals."), *South Cent. Power Co. v. IBEW, Local Union 2359*, 186 F.3d 733, 737 (6th Cir. 1999) ("A district court's decision to grant or deny a permanent injunction is reviewed under several distinct standards. Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed *de novo*, and the scope of injunctive relief is reviewed for an abuse of discretion."). The scope of equitable relief may be discretionary in some sense, such that review of injunctive orders may sometimes be for abuse of discretion, but precisely speaking a district court does not have discretion to determine whether due process requires a hearing in a particular context. We properly review such a legal issue de novo.

The comprehensive notice requirement imposed by the district court essentially provides inmates with notice of all of the evidence that may be relied on in determining his placement. Significantly, this requirement provides inmates appearing before classification committees with more notice than that received by criminal defendants at trial, where the liberty interests at stake are obviously more substantial. *See* Fed. R. Crim. P. 16; *Weatherford v. Bursey*, 429 U.S. 545,



559, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977) ("There is no general constitutional right to discovery in a criminal case. . .[and] the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . ."). As the Supreme Court has recognized, "prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff*, 418 U.S. at 556. In my view, the comprehensive notice requirement extends beyond what due process requires.

In upholding the district court's requirement, the majority relies on *Sandin* to conclude that the liberty interest in this case is particularly weighty. If anything, however, the opposite inference is warranted. That is, under *Sandin*, a liberty interest arises from "atypical and significant hardships" not implicit in the original sentence. Typical or less significant hardships thus do not even rise to the level of a protected liberty interest. It is only the atypicality or the extraordinary significance of the hardship that is even enough to raise due process concerns. It follows that a hardship that is only marginally atypical and marginally significant should only be given marginal weight in an *Eldridge* analysis. It is illogical to say that any interest that meets the *Sandin* test must be of a weight requiring greater due process protection. On the contrary, a prisoner gains due process protection under *Sandin* only when the hardship exceeds typical hardship. Because in a sense it is the excess over typical hardship that warrants due process protection, it is logical that it be that excess that is weighed as the private interest in the *Eldridge* analysis. Since that excess may be very small, the fact that the interest was determined under *Sandin* may instead imply that the private interest be given a lesser weight than in the case of another type of protected property or liberty interest. In any event, the fact that the liberty interest

is determined under a *Sandin* analysis cannot, without more, lead to the conclusion that the interests will be deemed to weigh particularly heavily.

Secondly, we must evaluate the increase in accuracy that will result from the procedural requirement that the decisionmakers limit their placement decision to the grounds and evidence detailed in the notice given to the inmate. A general finding that erroneous and haphazard placements have occurred in the past is insufficient. Instead, under the second factor of *Eldridge*, we must evaluate the extent that the particular procedural requirement increases the accuracy of the decisionmaking.

Under the ORDC Officials' new policy 111-07, inmates received written notice explaining the reasons they were referred for a classification hearing. *See* J.A. at 716, 731. The district court ordered that, not only must ORDC officials provide advance written notice of the reasons for the referral to a hearing, but that they must also provide "written notice of all the grounds believed to justify [placement] and a summary of the evidence that the [officials] will rely upon for the placement." *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1026 (N.D. Ohio 2002). The district court added a footnote that appears to preclude consideration of evidence not described in the notice: "If [ORDC Officials] elect to use [a proposed form] to give an inmate notice, they must limit the grounds stated on the form and the evidence generally described on the form, to support placement at OSP." *Id.* The majority fails to explain, however, how requiring ORDC officials to provide an inmate with such comprehensive notice increases the accuracy of the placement decision for a given inmate. The district court reasoned that



> requiring Department officials to give inmates specific notice of all of the grounds for placing and retaining them at OSP would cause minimal hardship. The officials would only need to expend the additional time to write out their reasons for making a specific classification decision. Furthermore, this minimal amount of additional time would increase the Department's efficiency. Accurately summarizing all the grounds supporting an inmate's placement at the OSP would later assist reviewing entities and avoid unnecessary prisoner assignments to the OSP.

*Austin v. Wilkinson*, 189 F. Supp. 2d 719, 746 (N.D. Ohio 2002). The district court's analysis misapprehends the burden that a comprehensive notice requirement imposes on the government. In making such decisions, ORDC Officials rely on a wide range of information. The hardship in expending additional time to write out reasons for making a specific classification decision may indeed be minimal. However, requiring that, prior to even conducting a hearing, ORDC Officials cull through often voluminous records and note every potentially relevant fact—on pain of barring them from considering any information, no matter how relevant, that was inadvertently omitted—is significantly more onerous. Such burdens have not been shown to be outweighed by the improvement in accuracy—assuming there is any—asserted to arise from the comprehensive notice requirement.

Nor is the comprehensive notice requirement necessary to vindicate the interests cited by the district court. Under the procedural process required by the district court, the classification committee is responsible only for making the

initial recommendation concerning whether an inmate should be assigned to OSP; both the warden (or the warden's designee) and the Bureau of Classification must agree with the committee's recommendation before an inmate can be placed at OSP. *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1026-28 (N.D. Ohio 2002). At each stage in the process, an inmate must be given a written statement explaining the justification for the placement recommendation and the evidence supporting it, as well as an opportunity to respond to the recommendation in writing. This process provides both a written record for review and ample opportunity for inmates to challenge their placement. Accordingly, I would find that the notice required under the new 111-07 is sufficient to satisfy due process in this context.

As to the remaining procedures imposed by the district court, the Government has failed to articulate in any significant manner how they burden the government. On their face the additional procedural requirements appear to increase the accuracy and reliability of the decisionmaking process, and they were arrived at by careful consideration by the district court. The private interest is substantial. I therefore agree that the procedural requirements imposed by the district court, apart from the one discussed above, were properly imposed by the district court.



Conclusion

For the foregoing reasons, I concur in the judgment except to the extent that it upholds the requirement that ORDC Officials provide comprehensive notice to inmates appearing before classification committees.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| CHARLES E. AUSTIN, et al., | ) | CASE NO. 4:01-CV-71 |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Judge James S. Gwin |
| | ) | |
| REGINALD WILKINSON, et al., | ) | |
| | ) | ORDER |
| Defendants. | ) | |

On April 24, 2002, the defendants filed their proposed Policy 111-07 in accordance with the Court's March 26, 2002, order [Doc. 272]. Having reviewed the defendants' proposed policy, the plaintiffs' response to the policy, and the defendants' reply, the Court adopts the defendants' April 24, 2002, proposed policy with the following changes:

1. The adopted policy will reflect the three phrasing changes described in the "Corrections" section of the defendants reply memorandum filed on May 13, 2002 [Doc. 281].

2. Both section VI(C)(III)(C)(8) [page 7 of the adopted policy] and section VI(J)(III)(H) [page 14 of the adopted policy] should be changed from "within five (5) working days" to "within ten (10) working days." There are no other changes to these sections.



3. The newly adopted Policy 111-07 should include the sentence: "No person who serves on a prisoner's classification committee should decide, or take part in deciding, the prisoner's appeal to the Warden or the Bureau of Classification." The Court leaves the placement of this language to the discretion of the Department of Rehabilitation and Correction (the "Department").

In addition, the Court orders that all forms used by the defendants in conjunction with the newly adopted Policy 111-07 should conform to the language of the adopted policy. The Court will not delay the implementation of the newly adopted Policy 111-07 while the plaintiffs review the Department's forms. However, the defendants have until May 22, 2002, to provide the plaintiffs' counsel copies of all the forms they will use under the newly adopted Policy 111-07. The plaintiffs have until May 30, 2002, to file any objections to the forms.

Next, the Court clarifies its order with respect to the language in section VI(I)(III) [page 12 of the adopted policy]. A prisoner's prior conduct that results in the death or extreme bodily harm to another may only be considered for retaining a prisoner in Level 5 classification if that conduct was used as one of the justifications for the prisoner's initial placement to Level 5. In such a case, the prisoner's prior conduct that resulted in the death or extreme bodily harm of another may be considered but the conduct must be considered in conjunction with his conduct while at the OSP.

Finally, the Court notes that under its March 26, 2002, order, all prisoners currently classified at Level 5 should receive an additional classification review under the newly

adopted Policy 111-07. Those reviews must be completed within eight weeks of this order.

IT IS SO ORDERED.

Date: May 15, 2002

*s/James S. Gwin*
James S. Gwin
United States District Judge



**APPENDIX C**

CHARLES E. AUSTIN, et al., Plaintiffs,
v.
REGINALD A. WILKINSON, et al., Defendants.

CASE NO. 4:01-CV-071
204 F. Supp.2d 1024
(N.D. Ohio 2002)

OPINION:

ORDER

On February 25, 2002, the Court found that the plaintiff inmates have a liberty interest entitled to constitutional protection because the length of their placement at the Ohio State Penitentiary ("OSP"), and the severity of its restrictive conditions, imposes an atypical and a significant hardship upon the inmates. The Court held that the defendants violated the plaintiff class's right to due process by denying the plaintiffs adequate notice, adequate hearings, and sufficiently detailed decisions concerning their placement at the OSP. Because the defendants have violated the plaintiffs' constitutionally protected liberty interest, the Court orders the least intrusive means to correct the violation. *See* 18 U.S.C. § 3626(a)(1)(A).

No person shall be placed or retained at a Level 5 security classification under Policy 111-07 except in compliance with the hearing procedures set forth herein.

I. Notice and Hearing

Before placing an inmate at Level 5, the defendants will provide the inmate written notice of the hearing at least forty-

eight hours before the hearing. In addition to notice of the hearing, the defendants will provide the inmate with written notice of all the grounds believed to justify his placement at Level 5 and a summary of the evidence that the defendants will rely upon for the placement. n1 The written notice provided the inmate must be sufficient to "enable him to marshal the facts and prepare a defense." *Wolff v. McDonnell*, 418 U.S. 539, 564, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974).

n1 If the defendants elect to use Form 2598 to give an inmate notice, they must limit the grounds stated on the form and the evidence generally described on the form, to support placement at the OSP.

The defendants must give the inmates an opportunity to appear before a classification committee and make an oral or written statement if the inmate so desires. At the hearing on whether the inmate will be classified to Level 5, the defendants must allow the inmate an opportunity to call reasonable witnesses and present documentary evidence as long as permitting him to do so will not be unduly hazardous or burdensome to institutional safety or correctional goals. *Id.* at 566. Upon request from an inmate being considered for Level 5 classification, the defendants will make reasonable efforts to secure the presence or participation by phone of inmate-witnesses housed at other facilities. However, the ability to present a defense does not extend to the right to cross-examination or confrontation. *See* 7 *id.* at 567-68. Nor is the inmate entitled to the right to counsel. *See id.* at 569-70.

If the Ohio Department of Rehabilitation and Correction (the "Department") wants to use the statement of a witness whose identity it wishes to withhold, the



Department shall "indicate this reliance and shall disclose to the inmate as much of the substance of the information as possible." (Pls.' Proposed Order Attach. 1 at 11). If the warden or the Chief of the Bureau of Classification wishes to rely on a statement that was not made known to the prisoner at the classification committee hearing, they shall follow the same procedure. Before using such information, the warden or the Chief of the Bureau of Classification will provide the inmate a reasonable opportunity to respond through a written statement and/or the submission of documentary evidence.

The classification committee shall make a record of hearings when an inmate is considered for placement to Level 5 security classification at the OSP. An audio recording is sufficient for this purpose. The defendants will retain this record while the inmate is at Level 5 classification at the OSP.

At the conclusion of the hearing, the classification committee shall inform the inmate of its recommendation. The classification committee will prepare a contemporaneous written statement of its recommendation, the justification for its recommendation, and a summary of the evidence supporting its recommendation. The classification committee will supply a copy of the recommendation to the inmate.

If the classification committee recommends placement to Level 5 security classification, the Department shall give the inmate notice of his right to appeal and the method for the appeal. The Department will give the inmate reasonable time n2 to prepare and submit a written response to the classification committee's recommendation.

n2 This "reasonable time" shall not be less than twenty-four hours.

After the warden or the warden's designee ("warden/designee") receives the classification committee's recommendation that he be reclassified to Level 5, the warden/designee will independently review the recommendation for consistency with the standards described in Policy 111-07. The warden/designee will recommend a placement. If the warden/designee recommends placement to Level 5, the warden/designee will provide a written justification of all reasons believed to support such a placement and will provide a copy of the recommendation to the inmate. If the inmate disagrees, the Department will allow the inmate to provide written argument and documentary evidence to the Bureau of Classification. The Bureau of Classification will make the final decision.

Regarding consideration of placement to a Level 5 security classification, the Bureau of Classification will consider the classification committee and the warden/designee's recommendations and, consistent with section VI(C) of Policy 111-07, will determine whether the inmate should be placed at Level 5. If the Bureau of Classification determines that the inmate should be placed at the Level 5 security classification, the responsible employee of the Bureau of Classification shall record a detailed and specific justification for the decision.

The justification shall set out all grounds justifying the inmates' placement at Level 5 classification and will not use conclusory or boilerplate language. The justification statement shall describe the facts relied upon and the reasoning used. This written statement shall address an inmate's specific case and not contain merely vague boilerplate language. The Department shall provide a copy



of the Bureau of Classification's written decision to the inmate within five working days.

When the Department conducts its annual hearing on whether an inmate earlier assigned to the OSP because of his Level 5 security classification should be reclassified to a lower classification level, the Department must use the same procedure described for initial placement at the OSP.

II. Grounds for Level 5 Classification

With regard to the grounds justifying placement at the OSP, the defendants may rely upon the grounds set out in section VI (C) of Policy 111-07 with the following changes: First, defendants will revise section VI(C)(4) to set a reasonably specific description of the type and quantity of contraband that will make an inmate eligible for placement at Level 5 classification. As to the quantity of illegal drugs that can subject an inmate to Level 5 classification, the quantity chosen should reflect a level that would subject an inmate to incarceration for at least a third degree felony. Alternatively, section VI(C)(4) could allow Level 5 classification placement for multiple violations involving lesser quantity of drugs.

Upon revising section VI(C)(4), defendants shall submit the proposed revisions to this Court for approval. Until the Court approves a revised section VI(C)(4), the defendants shall not place inmates at the Level 5 security classification for conspiracy or attempt to convey, introduce or possess major contraband.

Second, defendants will revise Policy 111-07 to clearly set out the type of security group threat or gang involvement that justifies placement at Level 5 classification. Regarding

this criteria for placement, Policy 111-07 would be acceptable if it used the criteria formerly employed: "the inmate functions as a leader or enforcer of a security threat group." (Pls.' Ex. 2 at 2). The revision to Policy 111-07 should also require that the inmate was a leader, enforcer, or recruiter of a gang involved in violent or disruptive behavior.

The Court has found that Policy 111-07's criteria for decisions on retention are vague. While Policy 111-07 sets out appropriately considered factors at pages nine and ten, it fails to give sufficiently definite standards for the use of the factors.

To meet constitutional requirements of notice and justification, the defendants shall revise Policy 111-07 to clearly state the factors to be used for reclassification. Unless an inmate's prior conduct during incarceration resulted in death, or extremely serious bodily harm, the inmate should generally qualify for reclassification to a lower security classification if he has not committed any violence within the previous three years and has no major misconduct within the past two years while placed at the OSP. More generally, unless an inmate's prior conduct during incarceration resulted in death or extreme bodily harm, the Department should only consider "behavior in the last five years, including prior to Level 4 or 5 classification." (Defs.' Ex. C at 9).

At least twice a year, the Department will notify the inmate in writing and orally of the inmate's progress toward security level reduction. Such notice will advise the inmate what specific conduct is necessary for that prisoner to be reduced from Level 5 and the amount of time it will take before the defendants' reduce the inmate's security level classification.



III. Defendants' Changes to Policy 111-07 and Review Hearings

The defendants will submit proposed changes to Policy 111-07 within thirty days for approval. Until approved by this Court, no additional prisoners shall be placed on Level 5 unless approved by the Court. After the Court approves the defendants' changes to Policy 111-07, the defendants will comply with all of the provisions of revised Policy 111-07.

To afford inmates currently classified at Level 5 the rights described in this Court's opinion, the defendants shall conduct an additional review of inmate security classifications in compliance with the revised Policy 111-07 approved by this Court. The defendants will complete this classification review within eight weeks of the approval of revisions to Policy 111-07.

IV. Monitoring and Document Production

The defendants shall provide to the plaintiffs' counsel copies of any additional policies, forms, and other directives adopted by defendants in implementation of this injunction.

The defendants shall provide to the plaintiffs' counsel a list of all members of the class showing the inmates first and last names, incarceration number, date of arrival at the OSP, current privilege and security level and the name of the institutions from which the inmates were transferred to the OSP.

The defendants shall provide to the plaintiffs' counsel copies of all Level 5 placement and retention recommendations and final decisions for class members

whenever a placement or retention decision about that prisoner is made, including any and all forms utilized such as security designation forms, supervision review forms, notice of hearing forms, information presented by the inmate, information presented by staff, classification committee reports of Level 5 placement and privilege/security level review forms.

The defendants' counsel shall meet monthly with the plaintiffs' counsel to facilitate the delivery of documents, and to discuss and, if possible, resolve problems related to the implementation of this order.

V. Retention of Jurisdiction

The Court will retain jurisdiction over this matter for the purpose of enforcement. This injunction shall terminate in two years upon the motion of either party unless the Court finds that prospective relief is needed to correct an ongoing violation of a federal right. *See* 18 U.S.C. § 626(b)(1)(A)(i).

IT IS SO ORDERED.

Date: March 26, 2002
/s/
James S. Gwin
United States District Judge



## APPENDIX D

CHARLES E. AUSTIN, et al., Plaintiffs,
v.
REGINALD WILKINSON, et al., Defendants.

CASE NO. 4:01-CV-71
189 F. Supp. 2d 719 (N.D. Ohio 2002)

OPINION:

OPINION AND ORDER

In this case, a class of current and former prisoners at the Ohio State Penitentiary ("OSP") says the defendants, all employees of the Ohio Department of Rehabilitation and Correction (the "Department"), violated their constitutional rights by denying them due process in their placement and retention at the OSP. The plaintiffs say conditions at the OSP give rise to a liberty interest because they impose an atypical and significant hardship on the prisoners in relation to the ordinary incidents of prison life. *See Sandin v. Conner*, 515 U.S. 472, 484, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995). Despite the existence of this liberty interest, the plaintiff prisoners claim the procedures used by the defendants in transferring them to the OSP and retaining them at the institution deny them due process.

Responding, the defendants deny that conditions at the OSP are atypical or impose a significant hardship. In major part, the defendants argue that the Court should compare the plaintiffs' conditions to those of other inmates at the OSP or to inmates in similar facilities in other states when determining whether the conditions are atypical. The

defendants alternatively argue that, if a liberty interest is found, they afford sufficient process to the inmates.

From January 2, 2002 through January 10, 2002, the Court conducted a bench trial on this matter at which it heard from twenty witnesses and accepted over one thousand pages of exhibits. After considering all of the evidence, and as hereinafter described, the Court finds that the nature and duration of restrictions at the OSP are conditions not expected by those serving similar incarcerations. The Court makes this determination despite finding that the current operation of the OSP, under the progressive stewardship of Warden Todd Ishee, has greatly improved inmates' treatment. Instead, the Court finds that inmates at the OSP face an atypical and significant hardship even under Warden Ishee's sensible leadership.

In laying out its decision, the Court first describes the conditions at the OSP. Next, the Court discusses its holding that confinement at the OSP is an atypical and significant hardship in relation to the ordinary incidents of prison life. After discussing the nature of the confinement at OSP, the Court considers the process afforded to inmates in challenging their initial placement and subsequent retention at the OSP. Finally, the Court discusses the appropriate remedy for the constitutional violation that it finds.

I. Factual Background and Discussion

In this case, the plaintiffs represent a class of current and former inmates at the OSP. They sue certain state officials for violation of their constitutional rights under 42 U.S.C. § 1983. n1 The plaintiffs sue the named defendants in their official capacities only for purposes of injunctive relief. Originally, the plaintiffs' suit alleged that the



defendants operation of the OSP was a violation of a number of the inmates' Eighth and Fourteenth Amendment rights. The parties have settled most of the claims. The only claim left at trial was the plaintiffs' claim that the defendants violated their right to due process in the selection and retention of inmates for the OSP.

n1 Plaintiffs sue Reginald Wilkinson, the director of the Ohio Department of Rehabilitation and Correction, Stephen J. Huffman, the former warden of the Southern Ohio Correctional Facility and the North Regional director of the Department, Bernard J. Ryznar, chief of the Department's Bureau of Classification, Todd E. Ishee, the warden at the OSP, Cheryl Jorgensen-Martinez, the Department's chief inspector, and Matthew Meyer, the Security Threat Group investigation coordinator for the Department.

A. Purpose of the Ohio State Penitentiary

The OSP is a high maximum security facility, also known as a "supermax" facility, located in Hubbard, Ohio, near the city of Youngstown. n2 Constructed in reaction to the April 1993 riot at the Southern Ohio Correctional Facility at Lucasville, the OSP supermax prison first received inmates in May 1998. The OSP was designed to house 504 male inmates in single-inmate cells. The OSP was designed as "a more secure facility, to handle prisoners who were hellbent on disrupting the orderly operation of our correctional institutions." (Wilkinson Dep. at 8). Ohio intended the OSP be "a location in the state that we can separate the most predatory and dangerous prisoners from the rest of the Department of Rehabilitation and Correction's general population." (Wilkinson Dep. at 24-25).

n2 The National Institute of Corrections defines a supermax prison as:

> [a] freestanding facility, or a distinct unit within a freestanding facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated. Such inmates have been determined to be a threat to safety and security in traditional high-security facilities and their behavior can be controlled only by separation, restricted movement, and limited access to staff and other inmates.

Chase Riveland, *Supermax Prisons: Overview and General Considerations* 3 (1999).

The OSP carries out this goal primarily through solitary confinement—extended periods of incarceration in which the inmate is kept alone in his cell and has minimal contact with the outside world. In other prisons, this type of confinement is commonly referred to as "segregation." The stark conditions and psychological consequences of solitary confinement at the OSP are noticeably different than at other Ohio prisons.

Before describing the conditions at the OSP, the Court notes that it was presented with evidence at trial suggesting that Ohio does not need a high maximum security prison or does not need one with the capacity of the OSP. Peter Davis, a member of the Ohio Parole Board and former executive director of the Correctional Institution Inspection Committee of the Ohio General Assembly, testified about the



Department of Rehabilitation and Correction's use of the J-1 cellblock at the Southern Ohio Correctional Facility. The Southern Ohio Correctional Facility is Ohio's only maximum security prison, the security level immediately below the OSP's high maximum security level. n3 The J-1 area is a self-contained cellblock of twenty cells that has tighter access requirements and allows less movement of inmates than a typical maximum security cell at the Southern Ohio Correctional Facility. The J-1 cellblock is the most restrictive cellblock within the Southern Ohio Correctional Facility. Before the OSP opened, the J-1 cellblock was the most restrictive and isolated cellblock in the Ohio prison system. (Davis Test. at 117-19).

n3 At the time of trial, Ohio assigned prisoners to one of five security levels: minimum, medium, close, maximum, or high maximum.

Suggestive that Ohio never needed the 504-inmate capacity of the OSP, before the OSP was built, Ohio did not fill the J-1 cells at the Southern Ohio Correctional Facility. (Davis Test. at 119). Instead, Ohio faced a different problem. It did not have a sufficient number of maximum security cells, the level below the OSP's high maximum security cells. The deficit of maximum security cells and the surplus of high maximum cells causes an imbalance in assigning inmates to appropriate confinement.

In December 1998, a Department of Rehabilitation and Correction quality review team made up entirely of correctional officials reviewed the operations at the OSP. n4 The quality review report supports the plaintiffs' claim that no clear standard describes which inmates would be placed at the OSP:

> When asked about the inmate population for which OSP is intended most all respondents cite "the worst of the worst." This concept has proven difficult to operationalize, particularly when we go beyond the 200 or so inmates who are clearly OSP material. Identifying those inmates who represent the "lighter" end of high maximum has become clouded by the overlap and similarity in characteristics among high close, maximum, maximum A.C. and high maximum inmates.

(Pls.' Ex. 10 at 2).

n4 The team included a former warden of the Southern Ohio Correctional Facility and the Department's chief counsel, among others.

The Department of Rehabilitation and Correction assigns inmates to the OSP from a conflicted position. The opening of the OSP has created too much capacity for the highest level of security. At the same time, Ohio lacks sufficient capacity at maximum security, the level of confinement below the OSP's high maximum security level. After the huge investment in the OSP, Ohio risks having a "because we have built it, they will come" mind set. As a result, the defendants consider inmates for placement at the OSP who do not need its level of restrictions.

B. Conditions at the Ohio State Penitentiary

Conditions at the OSP are significantly more restrictive than at other correctional facilities of the Department of Rehabilitation and Correction. First, inmates at the OSP are kept in their single cells for twenty-three hours a day. An



inmate's cell measures approximately 89.7 square feet and is sealed with a solid metal door. The cell door has a small, thick glass window. The door also has a "food slot" or "cuff port" that an officer may unlock to insert food or mail, and that is also used to put handcuffs on the prisoner before the door is opened. Inmates eat all meals alone in their cells.

The Department has made the cells more isolated by installing metal strips to the bottom and sides of the cells doors at the end of 2000. Before installation of the metal strips, the doors had half-inch gaps along the sides and two- to three-inch gaps along the bottom. The Department installed the strips ostensibly to stop the throwing of urine or feces, although the defendants did not give specific testimony of the frequency of such incidents. The Department does not use these metal strips at any other institution.

The OSP cells have a narrow outside window that cannot be opened. These small windows do not comply with the square footage standard established by the American Correctional Association. An inmate has no control over the heating and cooling of his cell or the amount and temperature of air blowing through the cell. The cells are sparsely finished, containing only a sink, a toilet, a small desk, and an immovable stool. Inmates sleep on a narrow concrete slab with a thin mattress, a pillow, a pillow case, a blanket, and a set of sheets. A light remains on at all times, although the light can be dimmed. The Department strictly limits the personal property an inmate may have at the OSP.

An inmate at the OSP may only leave his cell for one hour a day. During that hour, inmates have access to a recreation area with two rooms. In one of these rooms, the inmates can use minimal exercise equipment. In the other room, a slot with a grate that is approximately six inches

wide by four feet high allows outside air to circulate through the room. The room gives the sensory impression of a closed room with a small screen opening to the outdoors. Both recreation rooms are cells within the building. Until recently, recreation for all inmates at the OSP was solitary. Now, however, a limited number of inmates at the OSP may have recreation with one other prisoner.

The ceiling height of the recreation rooms do not meet the American Correctional Association's established standard. After auditing the conditions at the OSP, the American Correctional Association also found that the OSP did not comply with its standards for outdoor recreation.

The OSP is significantly more restrictive than other Ohio correctional facilities, including those facilities housing inmates under administrative control. n5 The other Ohio Department of Rehabilitation and Correction facilities do not lack outdoor recreation. n6 In contrast to inmates at the OSP, inmates in administrative control on death row at the Mansfield Correctional Institution have outdoor recreation, more access to personal property, more access to telephone usage, and more access to counsel. (Jason Robb Test. at 153-54).

n5 Administrative control is highly restrictive solitary confinement. *See* Ohio Admin. Code § 5120-9-13 (2001). Inmates at various Ohio institutions are placed in administrative control for, among other reasons, prison rule infractions.

n6 The defendants presented evidence that the Department will seek funds to construct outdoor recreation spaces at the OSP. If approved by the Office of Budget and Management, the request will be submitted to the Ohio General Assembly. Whether the



General Assembly approves funding for the outdoor recreation area in its 2002 capital budget will not be known until June 2002.

Administrative control prisoners at the Lebanon Correctional Institution, Orient Correctional Institution, and Lorain Correctional Institution live in open-faced cells. The Lebanon facility allows administrative control inmates access to basketball courts and work-out areas. At the Southern Ohio Correctional Facility, administrative control inmates live in cells with bars, not solid doors, and have outside recreation available every day. Similarly, the Trumbull Correctional Facility has outdoor recreation. Most important to the quality of conditions, Ohio's other facilities all afford inmates a much greater ability to communicate with other persons. The conditions at the OSP do not allow any amelioration of the prolonged isolation designed into the OSP's structure.

The Department of Rehabilitation and Correction also restricts inmates at the OSP more intensely during the brief periods they are outside their cells. For example, until very recently, the defendants required inmates receiving visitors to be shackled into an uncomfortable "black box" that contorted their wrists. In addition, inmates having visitors are still required to be stripped searched when they leave their cellblock and when they reenter the cellblock. The OSP subjects inmates to these searches even though the visits are made through solid windows that do not allow any possible contact with the visitor.

The Department also limits contact between fellow OSP inmates. As described above, inmates always eat alone. They usually exercise alone, although now some inmates may occasionally exercise with one other inmate. Inmates

are not permitted to share books, magazines, or other personal property. With the exception of some recently introduced group counseling sessions, inmates have almost no verbal communication with any other individual. n7 The defendants' expert, James Austin, described this:

> Q: When you were there, did you observe inmates communicating with one another?
>
> A: No. I observed there was some indications where they have two inmates who are recreating together, but I didn't—I didn't notice much communication because the inmates were almost always being brought out in isolation with no—I didn't see any contact with other inmates except for those situations in the housing units where they could recreate together.

(Austin Test. at 1020).

> n7 Group counseling sessions are conducted by placing inmates in adjacent bar-fronted cells so that each inmate can see the counselor and hear the other inmates.

The OSP's limitation upon communication contrasts with conditions at other correctional facilities, including administrative control units at Ohio's other prisons. For example, inmate James DeJarnette testified that inmates in administrative control at the Orient Correctional Institution can easily communicate through their bar doors. Such communication is next to impossible in the OSP with metal strips around the edges of the solid metal cell doors.



Once at the OSP, an inmate faces different levels of restriction based on the classification level to which he is assigned. There are three classification levels, and the levels are assigned to discipline and to reward. After orientation, the OSP classifies most inmates at Level II. After approximately one or two years without problems, inmates can progress to Level III with attendant additional privileges. Similarly, the OSP assigns inmates who violate prison rules to Level I. Level I is the most restricted confinement possible and may last for an indefinite period of time. At Level I, prisoners receive no visitors except for their attorneys and receive no phone calls apart from calls with their attorneys or for family emergencies.

At the OSP, inmates are normally allowed to make one ten-minute phone call a week. Under the Department's new policy, effective March 1, 2002, inmates will only be allowed two ten-minute calls a month. Under the same policy change, the Department will reduce recreation outside the cell from seven one-hour periods per week to five one-hour periods a week.

At the OSP, inmates do not participate in any prison-based work. One inmate per cellblock is responsible for keeping the area tidy. Except for the rare visitor and one hour a day of recreation, inmates remain in their cells. The OSP has no educational programs beyond the GED level. Instructional programs come to inmates through closed-circuit television and self-study workbooks. Most mental health programs available to the inmates also come through the small black and white television sets inmates are allowed in their rooms.

In conclusion, inmates at the OSP live under significantly different conditions than prisoners at Ohio's

other correctional facilities, including those prisoners with maximum security classifications and those prisoners with maximum security classifications who are currently in administrative control.

The Court now turns to a discussion of the defendants' current procedures for selecting which inmates are placed at the OSP.

C. Selection Procedures and Consequences of Placement at the Ohio State Penitentiary

The plaintiffs challenge the procedures the Department of Rehabilitation and Correction uses to select inmates for placement and retention at the OSP. Regarding placement at the OSP, the Department first transferred inmates to the OSP in early May 1998. At the time of this initial transfer, the Department had no policy in effect identifying which inmates could suitably be placed at the OSP. Without any transfer policy in place, the Department simply relied upon wardens to choose inmates for transfer. Without any set criteria, similarly situated inmates were often treated differently. Peter Davis, an Ohio Parole Board member and former director of the Ohio General Assembly's prison oversight committee, testified:

> The only thing that's clear is, as I've said here, for every inmate that was cited to me and the reasons why that person was sent there, for this particular act, this assaultive behavior, if you will, we knew for a fact of plenty other inmates that were at other institutions, even close security institutions, that were not transferred there.



> My frustration was tying to understand how the criteria was being applied, whether or not it was being applied consistently at all institutions on referral, whether or not it was being applied consistently at central office level in those determinations.
>
> Just simply was no way to understand how one assaultive inmate could get high max placement and other assaultive inmates could not.

(Davis Test. at 126).

On August 31, 1998, the defendants attempted to establish some predictability to placement at the OSP by issuing Department of Rehabilitation and Correction Policy 111-07 ("Policy 111-07"). The defendants issued this policy after a large number of inmates had already been transferred to the OSP. The policy described behavioral criteria that referral committees at Ohio's prisons should consider before recommending an inmate to the OSP. The policy was based on a April 15, 1998, memorandum by Regional Directors Norm Hills and Eric Dahlberg. The current version of Policy 111-07 used to transfer inmates to the OSP became effective on January 28, 1999.

The Department's review of an inmate's placement at the OSP differs from the review inmates receive when they are placed into administrative control at other Ohio prisons. At other prisons, the administrative control committee can release an administrative control prisoner without a classification review. In contrast, release from the OSP requires an inmate to be reclassified from high maximum security to maximum security.

An inmate at the OSP is considered for reclassification only once a year. This reclassification process includes several levels of review. Initially, an OSP inmate has a hearing before a three person reclassification committee. The reclassification committee is composed of an OSP deputy warden, a designee of the Department's North Regional Director, and a Department mental health professional. Under the Department's reclassification process, the OSP reclassification committee makes an initial recommendation of whether an inmate should stay at the OSP or be reclassified and transferred to a maximum security prison.

After the committee makes its recommendation, the OSP warden reviews the decision and reaches his own conclusion. He makes this review without notice to the inmate of any additional factors not considered by the reclassification committee. After review and decision by the OSP warden, the chief of the Bureau of Classification reviews both the committee's recommendation and warden's decision. Finally, after the chief of the Bureau of Classification has approved or disapproved of the committee's recommendation, the Department's North Regional Director makes the final decision. n8

n8 The Court discusses below the Department's adoption of a new classification policy that goes into effect on March 1, 2002. When the policy becomes effective, the chief of the Bureau of Classification will make the final decision about whether an inmate at the OSP is reclassified.

After reviewing the evidence presented at trial on the issue, the Court questions how much consideration is given to the review of each inmate's reclassification



recommendation. Within the Bureau of Classification, Chief Bernard Ryznar reviews all reclassifications involving the OSP inmates. In addition to this task, he supervises a staff of nine and reviews each administrative control placement in Ohio's 44,000 inmate population. (Ryznar Test. at 638). Although his co-workers assist him, Chief Ryznar is also responsible for authorizing each of the thousands of transfers within the Department of Rehabilitation and Correction each year. (Ryznar Test. at 618, 638). He personally reviews each maximum security placement. He also reviews other placement issues that are brought to him, and he supervises the placement recommendations of his staff. Finally, he alone makes at least 400 high maximum security classification decisions each year. (Ryznar Test. at 638-39).

North Regional Director Stephen J. Huffman has even more responsibilities than Chief Ryznar that distract him from time needed to review high maximum security classifications. The Department's Regional Directors essentially manage all aspects of the correctional facilities within their geographic area. Classification decisions are a very small part of their responsibilities in running a huge organization.

Placement and retention at the OSP has immense consequences for some inmates. As described above, the OSP conditions are significantly more restrictive than the conditions at other prisons. In addition, initial placement at the OSP denies some inmates the chance to be considered for parole because of a Department policy. The Department has a policy, approved by Director Wilkinson, that prevents inmates in maximum security facilities from being paroled.

Any inmate with a maximum security classification or any other classification title

> utilized to denote the most serious security risk inmates, at the time of release eligibility, shall not be granted release . . . Release at any such projected release date shall be conditioned upon the inmate receiving a security classification less than maximum, or any other security classification title utilized to denote the most serious security risk inmates.

(Pls.' Ex. 3 at 8). Therefore, no inmate in the OSP's high maximum security classification can be paroled.

1. James DeJarnette

Inmate James DeJarnette's case exemplifies the effect placement at the OSP has on parole eligibility. Convicted of armed robbery with a firearm specification, DeJarnette began serving an indeterminate sentence of three to fifteen years on April 22, 1993. While housed at the Orient Correctional Institution on a medium security classification, DeJarnette assaulted a correctional officer while intoxicated. The Orient Correctional Institution discipline committee unanimously agreed DeJarnette should be punished by being placed in administrative control at his current prison. The discipline committee also unanimously agreed against increasing his classification level and transferring him to the OSP. The Orient Correctional Institution's warden agreed with the discipline committee.

Despite these recommendations and the dismissal of the criminal indictment against DeJarnette arising from the assault, the chief of the Bureau of Classification increased DeJarnette's security classification three levels to high maximum and transferred him to the OSP in October 1998. DeJarnette was sent to the OSP without notice or explanation



of why the Orient Correctional Institution's discipline committee and warden's recommendations were ignored.

While at the OSP, DeJarnette participated in programming and mainly complied with all prison rules. The only exceptions were attempting to share a newspaper with another inmate and being found with an altered radio because a screw had come out of the radio cover. After fourteen months at the OSP, DeJarnette received a classification review. In December 1999, the reclassification committee, made up of three Department employees pursuant to Policy 111-07, examined DeJarnette's security classification. The committee recommended that he remain at the OSP. Warden Ishee and the chief of the Bureau of Classification concurred with the recommendation.

As the result of DeJarnette's three-level increase to high maximum security, he was automatically denied parole when he appeared before the Ohio Parole Board in August 2000. n9 Parole board guidelines recommend that a first-time offender like DeJarnette receive parole after serving forty-eight to sixty months. Because of DeJarnette's high maximum security classification, he could not be paroled even though he had served over ninety months. The parole board's records explain its thinking:

> Inmate serving 1st adult commitment. He is currently high max security with next screening[,] next security screening 12/2000. He has served above the recommended range. However, his security status prevents a release recommendation. Time assessed to get inmate to earliest appointment for reduction to close [security] . . . Requiring 19 additional months to serve until next [hearing] eligibility." n10

(Pls.' Exp. DeJarnette-9 at 2)

> n9 James DeJarnette was denied parole in June 1999 for the same reason.
>
> n10 Under the Department rules, inmates can only be paroled from a close, medium, or minimum security level classification. Although DeJarnette met the parole board's guideline for release, he also needed to complete successfully a period, usually twelve months, at the maximum security classification before being moved to a close security classification.

After receiving this indication from the parole board that he would qualify for release if he could move to an appropriate security level, DeJarnette again appeared before the OSP reclassification committee in November 2000. This time the reclassification committee recommended that DeJarnette's security classification be reduced and he be removed from the OSP, saying DeJarnette had made a "good adjustment" and was "not a behavioral problem." (Pls.' Ex. DeJarnette-11). Despite this recommendation for a reduction in security level classification, the OSP warden, Chief of the Bureau of Classification, and the North Regional Director all decided against reducing DeJarnette's security classification. Importantly, the North Regional Director never heard from DeJarnette before deciding to keep him at the OSP, never fully explained his reasons behind the decision, and never told DeJarnette what issues prevented a reduction in his security level.

DeJarnette's case is especially troubling because increases or decreases in an inmate's security classification level usually occur one level at a time. Jumping multiple



security levels is the exception and not the rule. (Ryznar Test. at 628). After the Department reviewed the OSP's operation in December 1998, the review team reported:

> Some Wardens believe that an inmate must progress through close security and maximum security before being considered an appropriate high maximum placement. Although this requirement is not found in either the original Memorandum regarding high maximum (Appendix C) or the policy on maximum security (111-07, Appendix D), there appears to be a strong perception among institutional personnel that this procedure must be followed.

(Pls.' Ex. 10 at 4-5).

2. Daryl Heard

Inmate Daryl Heard's experiences also highlight the consequences of placement at the OSP. His case further demonstrates the defendants' willingness to disregard a reclassification committee's recommendation concerning an inmate's security level. After conviction in 1982 for aggravated robbery, aggravated burglary, and kidnaping, Heard worked his way down to a minimum security classification. In March 2000, the Orient Correctional Institution Rules Infraction Board brought rule violation charges against Heard for involvement with a scheme to bring marijuana into the prison. He was convicted of those charges and disciplined by being placed into local control for fifteen days. Additionally, his security classification was increased from minimal to medium. In June 2000, his case was submitted for possible high maximum placement. Because of his attempt to smuggle in marijuana seven

months earlier, the chief of the Bureau of Classification ultimately recommended his security level be increased three levels to high maximum. n11 In October 2000, Heard was transferred to the OSP.

> n11 Under policies governing assignment to the OSP in effect at the time, it is not clear how the Department elevated Heard four levels to the high maximum security classification at the OSP. The Department's Policy 111-07 controlled placements to the OSP at that time. That policy states, in part:
>
> VI. Procedures:
>
> A. Assignment Criteria. Inmates will be recommended for and assigned to high maximum security when *all* of the following factors are present:
>
> 1. The inmate is or is about to be classified as maximum security;
>
> . . . .
>
> 3. The inmate presents the highest level of threat to the security and order of the department and its institutions, in the professional judgment of the classifying official.

(Pls.' Ex. 1) (emphasis added).

At the time the Department transferred Heard to the OSP, he was not at a maximum security classification. After his involvement with the drug offense, his classification level was only increased one



level to medium security while he was in local control at the Orient Correctional Institution.

When deciding to increase Heard's security classification four levels, the Department noted that Heard had not been involved in violence in the last sixty months. He served over three years at the minimum security classification without any incident prior to the marijuana involvement.

On December 18, 2001, Heard had a parole hearing. At the time of the hearing, Heard had served 235 months of incarceration. The parole board guidelines suggested Heard should be paroled after serving between 156 and 192 months. (Heard Test. at 289). Heard was denied parole because of his high maximum security classification. Recognizing the impact of the Department's rule against paroling inmates classified as maximum or high maximum security, the parole board asked Heard to contact it immediately if he obtained a close security classification so another hearing could be scheduled. (Heard Test. at 293).

3. Keith Gardner

Inmate Keith Gardner's case gives a further example of the effect placement at the OSP has on parole eligibility. Now forty-four years old, Gardiner has been in prison since age nineteen for a murder conviction. Having served twenty-five years, he has served more time than the parole board guidelines suggest. The Department transferred Gardner to the OSP in November 1998 after an incident in which another prisoner was stabbed. The state prosecuted

Gardner for the stabbing. At trial, Gardner argued self-defense, an affirmative defense to which Gardner had the burden of proving by a preponderance of the evidence. *See* Ohio Rev. Code § 2901.05(C); *see also State v. Barnes*, 94 Ohio St. 3d 21, 24, 759 N.E.2d 1240, 1244 (2002). n12 The jury acquitted Gardner, finding that he acted in self-defense.

n12 The *Barnes* court stated:

> To establish self-defense, a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.

*Barnes*, 94 Ohio St. 3d at 24, 759 N.E.2d at 1244.

Despite the acquittal, the Department increased Gardner's security classification and transferred him to the OSP in April 1999. While at the OSP, Gardner had no rule violations and he participated in numerous programs. In both 2000 and 2001, the reclassification committee reviewed his security classification and recommended that the Department reduce Gardner's security classification. In 2000, Mansfield Correctional Institute Warden Baker, serving as a member of the reclassification committee, told Gardner he "shouldn't



even be here." (Gardner Test. at 387). In addition, written on Gardner's 2000 form filled out by the reclassification committee is the comment: "Placement to OSP questionable. No recent disciplinary action after A/C release 1/98." (Pls.' Ex. Gardner-3). On both occasions, the committee's recommendation was rejected, and Gardner was kept at a high maximum security classification. n13 In rejecting the committee's recommendation to decrease Gardner's security classification, the Department principally based its decision upon the stabbing incident of which he was acquitted years earlier.

n13 Interestingly, the warden of the OSP agreed with the reclassification committee's recommendation to reduce Kevin Gardner's security classification in 2000 but did not agree with the recommendation in 2001. The warden disagreed with the committee's recommendation because of Gardner's "extensive history of [assaults] and predatory acts." (Pls.' Ex. Gardner-5 at 2). However, this history must also have existed in 2000 as Gardner had no rules violations between his 2000 and 2001 reclassification hearings. (Pls.' Ex. Gardner-5 at 2).

As with Heard and DeJarnette, the Department's decision to retain Gardner at the OSP rendered him ineligible for parole. Gardner has served more than twenty-five years of his original sentence of life with a possibility of parole after fifteen years. However, the Department's rule forbidding parole release from high maximum security denied the parole board an opportunity to exercise its discretion.

D. Review of Inmates Once at the Ohio State Penitentiary

As demonstrated by these accounts, the Department's procedures for reviewing an OSP inmate's classification do not provide the prisoner a hearing or even access to the individual deciding the inmate's security classification. The Department's procedures for initially moving someone to the OSP also suffer from the same lack of notice and opportunity for hearing.

For instance, the Department sent more than one hundred inmates to the OSP before adopting its Policy 111-07 concerning such transfers. While lacking a formal policy, the Department transferred inmates under the guidance of the April 15, 1998, memorandum from Regional Directors Hills and Dahlberg. The memorandum informs wardens that inmates will be assigned to high maximum security when:

> The inmate is or is about to be classified as maximum security;
>
> The inmate has demonstrated behavior which meets high maximum security criteria; and/or
>
> The inmate presents the highest level of threat to the security and order of the department, in the professional judgment of the classifying official.

(Joint Ex. 19). n14

n14 The memorandum lists the following behavior as criteria for classification to high maximum security status:



> The inmate's conduct or continued presence at the sending institution poses a serious threat to the physical safety of any person, or to the security of the prison;
>
> The nature of the inmate's criminal offense indicates that the inmate poses a serious threat to the physical safety of any person, or to the security of the prison;
>
> The need to contain, prevent or quell a disturbance or riot;
>
> A conspiracy to introduce contraband which may pose a serious threat to the security of the prison;
>
> The inmate functions as a leader or enforcer of a security threat group;
>
> The inmate poses a serious threat or escape; or
>
> The inmate has demonstrated an ability to compromise the integrity of staff.

(Joint Ex. 19).

The memorandum's lack of specificity and guidance made it almost worthless in describing which inmates should be assigned to the OSP. In addition, the vast majority of inmates initially transferred to the OSP in 1998 neither

received advance notice that they were being considered for transfer nor a hearing to contest their transfer. Only a few inmates received posttransfer hearings.

In support of their argument that some transfers and reclassification decisions are so irrational as to violate due process, the plaintiffs presented strong evidence showing that many of the Department's decisions to transfer and retain inmates at the OSP were made with little support. Perhaps there are no transfers to the OSP with less support than those of Kevin Roe and Lahray Thompson.

1. Kevin Roe

On January 26, 1989, the Cuyahoga County Court of Common Pleas sentenced Roe on a rape conviction. During his twelve years in prison, Roe had only minor rule violations, principally involving the use of marijuana. He was not charged with any rule violations in the two years before his transfer to the OSP.

In January 1999, the Southern Ohio Correctional Facility dealt with increased tensions caused by a series of assaults among inmates identified as gang members of either the Aryan Brotherhood or the Crips. No evidence suggested Roe was directly involved in any of the incidents.

During this same time, Roe received his annual classification review. After a hearing on January 20, 1999, the reclassification committee recommended raising his security classification from maximum to high maximum even though the board's behavior worksheet indicated he should be considered for a security level decrease. n15 The committee's justification for its recommendation was that Roe was a longtime member of a gang and had participated



in a racial disturbance over five years ago. (Pls.' Ex. Roe-2 at 2). Roe was not given notice that these issues would be used to increase his security classification. Furthermore, the committee does not explain why this evidence, without any proof of Roe's involvement in incidents at the prison, was sufficient to increase Roe's classification in January 1999, but that same evidence did not warrant an increase in his security classification in May 1998, when the OSP first began accepting prisoners.

n15 The committee used a supervision review form containing a formula that assists in making security classification recommendations. The formula assigns an inmate up to ten positive points for "unfavorable behaviors" and up to three negative points for "stability factors." (Pls.' Ex. Roe-2). These subtotals are added and applied to a chart. The form directs that an inmate with an aggregate negative score should be considered for a supervision decrease. Roe scored a value of negative one on his review form. (Pls.' Ex. Roe-2

Four days after his classification review, another inmate assaulted Roe by hitting him over the head with a spatula while Roe was standing in a food line. The control unit heating board presiding over the disciplinary charge brought against the other inmate acknowledged that Roe did not fight back. (Pls.' Ex. Roe-1) The Department never charged Roe with a rule violation for having gotten hit in the head from behind. Furthermore, the Department's Security Threat Group Coordinator Matthew Meyer testified:

> Q: Did he [Roe] get in any fights before that? Before he got hit in the head, was he involved with anything?

A: Not that we are aware of, sir.

(Meyer Test. at 1106).

Once Roe left the Southern Ohio Correctional Facility's medical area he was transferred to the OSP. He did not receive notice of his impending transfer or an opportunity to challenge his upgraded security status. In an attempt to quiet sentiments at the Southern Ohio Correctional Facility, along with Roe, the warden sent approximately twenty other inmates to the OSP. Many of these inmates were transferred even though they had no current misconduct and the Department never made out or proved a rule violation associated with gang membership or other security threat group. n16

n16 Security Threat Group Coordinator Matthew Meyer testified that his group has identified more than 900 different security threat groups in Ohio's prisons. (Meyer Test. at 1080). The groups range from very small, disorganized neighborhood groups to sophisticated and organized terrorist groups. (Meyer Test. at 1080).

At a closed hearing, Security Threat Group Coordinator Meyer testified regarding the evidence the Department relied on in its decision to assign Roe to high maximum security. Coordinator Meyer described violence and gang member gatherings in 1999 that did not involve Roe. Also, Coordinator Meyer never talked with Roe, and the evidence did not show that Roe had any connection with the incidents surrounding the 1999 gang disputes. Even considering the evidence generously, at best it shows that Roe may have had some past connection to the Aryan Brotherhood. However,



the Department's own rules require evidence of a leadership position in a security threat group before sending an inmate to the OSP. The defendants offered no credible evidence that Roe held a leadership position.

Nonetheless, Roe's high maximum security classification has continued for more than two years after the tension at the Southern Ohio Correction Facility has passed. Roe received a reclassification committee hearing in April 2000. Under the Department's formula, he scored a negative three on his supervision review form, the best score possible. The reclassification committee recommended his release from high maximum security, commenting:

> Roe was sent to OSP from general population 2 months after incidents. Was not involved in incident in library [word or words redacted] only involvement. He was hit with a spatula in chow hall. It appears he was assigned to OSP based on [word redacted] history in 97. Only 4 tickets during incarceration. No assaults or violence.

(Pls.' Ex. Roe-6).

The warden approved the committee's recommendation but Chief Ryznar denied it, stating that the "[inmate's security threat group] activity directly led to assaults, fights and disturbance at [Southern Ohio Correctional Facility]." (Pls.' Ex. 6).

In February 2001, Roe received another reclassification committee hearing. Once again, Roe scored a negative three on his supervision review form. Once again, the reclassification committee recommended reducing his security classification. The warden agreed. However, once

again, Chief Ryznar disagreed with the recommendation to reduce Roe's security classification, stating "recommend continue high max. Involved in conduct that resulted in disturbance at SOCF." (Pls.' Ex. Roe-10).

The Court is perplexed by Chief Ryznar's decision keep Roe at the OSP. The Court is even more troubled by Roe's lack of notice and opportunity to contest the reasons for which he was transferred. Although nothing presented in the trial's closed session appeared confidential, the Court does not more fully describe the testimony out of an abundance of caution. It is sufficient to say that the Court has reviewed all of the Department's records on Roe and finds nothing to support Chief Ryznar's assertion he was involved in the 1999 incidents at the Southern Ohio Correctional Facility. The evidence of Roe posing an ongoing threat is exceedingly weak.

Roe's behavior and threat do not even meet the standards of the defendants' own classification expert, James Austin. At trial, Austin describes these standards with regard to gang affiliation:

> Q: Could you give us examples of the type of thing [conduct that warrants long-term placement at OSP] you are thinking of?
>
> A: Inciting a riot, killing an officer, killing an inmate; you know, a history, a history of assaults on staff or inmates even though death may not occur, but every time this inmate comes out; a member of a Security Threat Group who is clearly the organizer of this group, and whenever this person is released a lot of bad things start happening wherever he or she may be.



> Q: Not someone who is just identified as a leader, but there's got to be clearly some concrete evidence that this person in a particular prison leads to riots or leads to something bad happening?
>
> A: Yeah, that type of person.

(Austin Test. at 1045). Nonetheless, Chief Ryznar decided to keep Roe at Ohio's most secure, and most expensive, n17 classification without much evidence and without giving Roe a hearing or informing him of the evidence leading to his retention at the OSP.

n17 The annual cost per inmate at the OSP is $49,007.44, while the annual cost per inmate at the maximum security Southern Ohio Correctional Facility is $34,167.24. *See* Ohio Dep't of Rehab. & Corr., *Ohio State Penitentiary, at* http://www.drc.state.oh.us/public/osp.htm (last modified Feb. 5, 2002); Ohio Dep't of Rehab. & Corr., *Southern Ohio Correctional Facility, at* http://www.drc.state.oh.us/public/socf.htm (last modified Feb. 5, 2002).

2. Lahray Thompson

The defendants offered even less evidence justifying the placement and retention of inmate Lahray Thompson at the OSP. In January 1999, Thompson was present at a fight at the Southern Ohio Correction Facility involving members of antagonistic gangs. The defendants never brought rule violations against Thompson to the Rule Infraction Board for a hearing. The Department's confidential security threat

group file on Thompson makes no mention of what role, if any, Thompson played in the fight.

Nonetheless, Thompson was transferred to the OSP. In transferring Thompson to OSP, the Department never clearly defined Thompson's role in the incident but determined that he was affiliated with a gang. (Pls.' Ex. Thompson-2 at 3). Thompson was not given notice that he might be classified to high maximum or an opportunity to defend against the gang affiliation charge before his transfer. n18

n18 Further demonstrating the uncertainty regarding the evidence against Thompson, at a reclassification hearing held at the OSP in February 2000, the committee commented:

> Ticket does not specify who he was fighting. Very generic. Inmate does not have any gang related tickets or any fighting or assault tickets in his record. It appears he has been mixed up with inmate Capone 293-878 who is ID'd as Crip leader.

(Pls.' Ex. Thompson-4).

Justifying the process used to send Thompson to the OSP, the defendants first say that Thompson indicated affiliation with the Crips while in his early teens living in California. Second, the defendants presented evidence Thompson once had a tattoo often associated with the Crips. Third, the defendants offered evidence that Thompson once wrote a letter using the letter "b" in a fashion sometimes used by Crips members to disrespect rival gangs. Finally, the



defendants produced a summary report that said Thompson was present at the time of the January 1999 fight. The report did not further describe his role, if any, in the incident.

The defendants have not shown the Court that Thompson was involved in gang related conduct, save the uncertain evidence that he may have been involved in the January 1999 fight. Even if Thompson had participated in the January 1999 fight, under the Department's own guidelines, his placement to the OSP appears unjustified. The edition of Policy 111-07 relevant to Thompson's transfer says that an inmate can be recommended for placement at the OSP if his behavior shows he "functions as a leader or enforcer of a security threat group." (Pls.' Ex. 1). Chase Riveland, one of the defendants' experts, supports this standard, giving his opinion that mere gang membership does not justify placement in an overly restrictive prison like the OSP. (Riveland Test. at 924-26).

Despite the minimal evidence used to support Thompson's placement to the OSP, the defendants have continued to keep him at a high maximum security classification. Thompson has not had a rule infraction citation while at the OSP. In both 2000 and 2001, the OSP's reclassification committee recommended reducing Thompson's security classification. However, on both occasions, he was ultimately denied a classification reduction. n19

n19 Interestingly enough, in 2000, the OSP's warden agreed with the reclassification committee's recommendation to reduce Thompson's security classification, but in 2001, the OSP's warden disagreed with the same recommendation even though nothing

about Thompson's situation had changed. (Pls.' Exs. 3-6).

The treatment of Thompson and Roe reflects a troublesome trend where the defendants deny reclassification based upon gang activity without giving the inmates notice and an opportunity to respond. Equally troublesome, reclassification is denied based on exceedingly weak evidence and alleged activity years in the past. In Thompson's case, he has been held in near solitary confinement for more than three years based on nothing more than the way he writes the letter "b," the fact that in 1999 he was with a group involved in a dispute, and his association with Crip members more than fifteen years ago while growing up in southern California.

Warden Ishee better described what the rule should be:

> Q: [These particular words] require the Security Threat Group coordinator to determine that a particular prisoner is an active member of a Security Threat Group or a Security Threat Group behavior.
>
> And just as a matter of clarification, do you understand the word "active" to mean current member of a Security Threat Group or currently engaging in Security Threat Group behavior?
>
> A: I think currently within a reasonable time frame. You know, if we, if we use the word "Current" exactly, that would have had to have been an action that just occurred or occurred within the last few days.



> Q: Well, what would seem to you a reasonable time frame?
>
> A: Within the—the period of review that applies to this instrument.
>
> Q: That is, within the past year?
>
> A: Generally, yes.

(Ishee Test. at 586-87).

Challenging the process afforded to inmates transferred to the OSP, the plaintiffs say the absence of process results in the OSP using a large amount of its expensive and restrictive capacity to house inmates involved with using or bringing drugs into a correctional facility. Currently, the OSP houses more than fifty inmates whose only rule violations are their involvement with drugs while in an Ohio prison.

In an unusually large percentage of cases, Chief Ryznar overrules the OSP reclassification committee's recommendations. Over a one-year period, the reclassification committee held 369 hearings on inmates at the OSP. Of those 369 hearings, the reclassification committee recommended reducing 157 inmates' (43%) security classifications. (Defs.' Ex. O at 9). But ultimately, the Regional Director only recommended seventy-one inmates (19%) for a security reduction. (Defs.' Ex. O at 9). In contrast, Riveland, the defendants' expert and former head of the State of Washington's prison system, testified that he did not often overturn a committee recommendation concerning a high maximum security classification. n20

n20 Riveland testified:

> Q: Can you comment on the frequency with which you overturned the committee?
>
> A: The frequency of overturning the committee recommendation was not common, but it did occur.

(Riveland Test. at 934).

In defending his reviews, North Regional Director Huffman simply says that he is more conservative and might have security threat group information not available to the reclassification committee. (Huffman Test. at 1141). The Court was not overly persuaded by this testimony as the security threat group information involved in the cases of Roe and Thompson hardly shows an ongoing threat even if one were to stretch and find a gang association in the first place. While the Court agrees that reviewing individuals should be conservative, the issue here is not about releasing these inmates from prison. The inmates would simply be classified as maximum security, a level at which they remain subject to severe restrictions.

Against this factual backdrop, the Court now turns to a discussion of the law controlling its determination of the plaintiffs' procedural due process rights. In this discussion, the Court considers new policies that the defendants plan for the future. As discussed below, the Department's new rules improve upon its current procedures but still do not provide the plaintiffs with adequate due process.



## II. Discussion of Procedural Due Process

Criminal incarceration does not end all constitutional protections. *See Wolff v. McDonnell*, 418 U.S. 539, 555-56, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); *see also Estelle v. Gamble*, 429 U.S. 97, 103-04, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) (right to be free from cruel and unusual punishment); *Cruz v. Beto*, 405 U.S. 319, 321-23, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972) (right to freedom of religion); *Johnson v. Avery*, 393 U.S. 483, 485, 21 L. Ed. 2d 718, 89 S. Ct. 747 (1969) (right of access to the courts).

Although prisoners do not lose all constitutional rights, they are subject to additional restrictions upon those rights. *See Turner v. Safley*, 482 U.S. 78, 95-97, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987) (holding that the fundamental right to marriage is subject to limitations as a result of incarceration); *Pell v. Procunier*, 417 U.S. 817, 827-28, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974) (restricting inmates' first amendment right to access to news media). Generally, prisoners retain those rights compatible with the objectives of incarceration. *See Hudson v. Palmer*, 468 U.S. 517, 523, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984); *Vitek v. Jones*, 445 U.S. 480, 493, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) (noting that incarceration deprives inmate of right to freedom from confinement).

Despite prisoners' retention of certain constitutional rights, federal courts have been hesitant to interfere with the administration of prisons. *See Sandin v. Conner*, 515 U.S. 472, 482, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995) (noting that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); *Turner*, 482 U.S. at 85 (stating that the separation of powers doctrine should caution judicial intervention in prison administration because it is an area

traditionally governed by the state legislative and executive branches); *Rhodes v. Chapman*, 452 U.S. 337, 352, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981) (stating that courts should exercise judicial discretion rather than assume prison administrators are insensitive to-prisoners' constitutional rights).

In this case, the plaintiffs say that the defendants violated their right to procedural due process. The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, § 1. As the plaintiffs were not deprived of life or property, they are only entitled to due process if they were deprived of "liberty" within the meaning of the Fourteenth Amendment.

The consideration of a due process claim goes through two steps. First, the Court asks whether a liberty or property interest exists with which the state has interfered. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993). Second, the Court determines whether the procedures attendant upon that deprivation were constitutionally sufficient. *See Thompson*, 490 U.S. at 460; *Pusey*, 11 F.3d at 656.

More specifically, the plaintiffs must plead and prove that state remedies for redressing the alleged violation are inadequate. *See Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999) (citing *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983)). The Sixth Circuit has elaborated on this requirement:

> In other words, a party may maintain a procedural due process § 1983 case in federal court if he alleges and proves that there was a constitutional violation under color of law and: (1) The state did not have a remedy; or (2) the state had a remedy but it was deemed inadequate; or (3) the state had an adequate remedy in form, both procedurally and in damages, but the state did not apply it or misapplied its remedy.



*Id.* With these elements in mind, the Court now analyzes the plaintiffs' due process claim.

A. The Plaintiffs' Protected Liberty Interest

To succeed on their procedural due process claim under 42 U.S.C § 1983, the plaintiffs must first demonstrate they possessed a protected liberty interest and were deprived of that interest without due process. *See Thompson*, 490 U.S. at 460; *Pusey*, 11 F.3d at 656. n21

n21 The defendants first that argue the plaintiffs' claims are barred by *Heck v. Humphrey*, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994), and *Edwards v. Balisok*, 520 U.S. 641, 137 L. Ed. 2d 906, 117 S. Ct. 1584 (1997). In *Heck*, the Court ruled that a damage claim implicating the validity of a conviction or sentence is not valid under § 1983 until the conviction or sentence has been overturned. *See Heck*, 512 U.S. at 486-47. In *Edwards*, in the context of a prison disciplinary proceeding leading to segregated confinement, the Court held that "the respondent's claim for declaratory relief and money damages, based on allegations . . . that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983." *Edwards*, 520 U.S. at 648. The defendants

say that the plaintiffs' substantive and procedural due process claims call into question the validity of the administrative determinations affecting their continued confinement and should be barred.

The defendants' argument does not persuade. The plaintiffs are not seeking money damages or judicial invalidation of their initial transfers to the OSP. The plaintiffs seek prospective injunctive relief for adequate due process in the Department's transfer and retention decisions concerning the OSP. In fact, *Edwards* specifically states that seeking prospective injunctive relief under § 1983 is proper. *See id.* The Court does find that little or no evidence supports some of the Department's transfer and retention decisions. However, those findings are only used to support the plaintiffs' claim they should receive adequate process in the Department's future decisions, not to invalidate the Department's past decisions.

In *Sandin*, the Court revisited its earlier decision in *Hewitt v. Helms*, 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). In *Hewitt*, the Court found that an inmate confined to administrative segregation did not have a liberty interest "independently protected by the Due Process Clause" because "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Hewitt*, 459 U.S. at 468. Nevertheless, the Court went on to hold that because Pennsylvania state law had established "specific substantive predicates" that must exist before restrictive confinement could be imposed, the inmate had a protected liberty interest in avoiding such confinement. *Id.* at 471-72.



*Sandin* rejected much of *Hewitt*'s reasoning. Specifically, the Court rejected *Hewitt*'s conclusion that a court had to ask whether "the State had gone beyond issuing mere procedural guidelines and had used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates. '"*Sandin*, 515 U.S. at 480 (quoting *Hewitt*, 459 U.S. at 471-72). The Court found *Hewitt* had created disincentives for states to codify their prison management procedures and led to the involvement of federal courts in the day-to-day management of prisons. *See* 515 U.S. at 482.

In order to correct these unwanted side effects, the Court held that [HN8] liberty interests in the prisoner context "will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. Although *Sandin* rejected *Hewitt*'s methodology, the Court continued to "recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause." 515 U.S. at 483-84. In deciding whether the state had created a liberty interest, the *Sandin* Court emphasized that "the real concerns undergirding the liberty protected by the Due Process Clause," 515 U.S. at 483, were whether the state deprived the prisoner of "an interest of 'real substance,'" 515 U.S. at 480 (quoting *Wolff*, 418 U.S. at 557). *Sandin* "shifted the focus of the liberty interest inquiry" a way from "the language of a particular regulation" and back to "the nature of the deprivation." 515 U.S. at 481.

Therefore, the Court must determine whether the nature of confinement at the OSP is an "atypical and significant hardship" giving rise to a protected liberty interest. This inquiry raises "many complex and fact-specific issues."

*Brown v. Plaut*, 327 U.S. App. D.C. 313, 131 F.3d 163, 170 (D.C. Cir. 1997).

In deciding whether placement at the OSP is atypical, n22 the Court must first choose an appropriate comparison. The plaintiffs argue the conditions at the OSP are atypical when compared to prisoners in administrative control. On the other hand, the defendants argue that the appropriate comparison is with the conditions at the OSP itself: "Ohio often transfers 'high security risk' inmates to OSP, the conditions of which are more restrictive than the sending prisons. Subjecting inmates to those conditions, which are no different from those ordinarily experienced by other similarly situated inmates in OSP is not 'atypical.'" (Defs.' Final Argument Br. at 12).

n22 Rather than repeat the phrasing an "atypical and a substantial hardship," the Court uses the word "atypical" as shorthand for both considerations unless specifically noted.

The Court rejects the defendants' suggested comparison. In *Sandin*, the Court said no claim could arise when the conditions of confinement were within the range that could reasonably be expected as a normal incident of incarceration. *See Sandin*, 515 U.S. at 484. However, the Court did not suggest that the existence of a condition somewhere within a state's prison system automatically made such a condition normal.

The courts of appeals have used varied comparisons. The Fourth and Ninth Circuit use the general prison population as the comparative baseline. *See Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). In contrast, the Second and



Third Circuits use the typical conditions of administrative segregation when deciding whether conditions are atypical. *See Griffin v. Vaughn*, 112 F.3d 703, 708 (3d Cir. 1997); *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997). Taking a different approach, the Seventh Circuit has defined the baseline as the conditions of nondisciplinary segregation in the state's most restrictive prison. *See Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997). According to the Fifth Circuit, segregation never implicates a liberty interest unless it lengthens a prisoner's sentence. *See Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997). The remaining circuits have applied *Sandin*'s "atypical and significant hardship" test without characterizing the comparative baseline. *See Bass v. Perrin*, 170 F.3d 1312, 1318 (11th Cir. 1999); *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 809 (10th Cir. 1999); *Kennedy v. Blankenship*, 100 F.3d 640, 642 (8th Cir. 1996); *Dominique v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996). The Sixth Circuit has not clearly described the appropriate comparison that the Court should use. *See Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.1997).

The Court finds that the better approach is to compare the range of prison conditions experienced by the plaintiffs against the complete range of conditions experienced by a broad range of similarly situated inmates. Placement in administrative control for limited periods of time is not an atypical change that imposes a significant hardship. But to determine whether the plaintiffs' placement at the OSP is atypical in relation to ordinary prison life, the Court must consider the duration and extent of the deprivation because "especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical." *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999).

When viewed against this standard, the Court finds that the conditions at OSP are atypical and impose a significant hardship. In reviewing this issue, the Court begins with the time an inmate is held at the OSP. The vast majority of inmates placed at the OSP will remain for a minimum of two years, with only an annual review of their status. To date, two hundred OSP prisoners have been there for more than three years.

This lengthy stay is a function of the current OSP procedures. Upon arrival at the OSP, inmates complete a month long orientation program and are then assigned to Level II. At the inmate's reclassification hearing, conducted approximately a year after arrival, the inmate may progress from Level II to Level III. Only once an inmate is at Level III may he be reclassified to the less severe maximum security status. Because reclassification hearings are only held annually, even inmates with exemplary behavior rarely progress through OSP in less than two years.

In contrast, inmates in administrative control or disciplinary control at other Ohio institutions, including the maximum security Southern Ohio Correctional Facility, are reviewed every thirty days. Terry Collins, the Department's deputy director of institutions, testified that:

> The most you can do in a disciplinary control cell at one time is 30 days. Typically the arrangements there are anywhere from one to 15 days. You could be placed there--if there's a spree of offenses that you go before the Rules Infraction Board on, you could be placed there for 30 days. Typically that stay is one to 15 days.



(Collins Test. at 1176-77).

He also testified that high maximum security incarceration at the OSP is qualitatively different than any other placement in the Department's prisons:

> Q: And those categories of incarceration, Mr. Collins, those will all be philosophically institutionally distinct from high max status, won't they?
> A: There—yes, most definitely different than high max facility.
>
> Q: High max will be intended for a different sort of inmate?
>
> A: Yes.
>
> Q: Will have a different sort of restrictive environment?
>
> A: Yes.

(Collins Test. 1175-76). n23

> n23 Terry Collins testified that disciplinary control inmates, unlike OSP inmates, do not even have limited television privileges and programming. (Collins Test. at 1176).

Even with good behavior, inmates at the OSP serve indefinite terms at the institution. With the exception of the end of their sentences, there is no other indication of how long an individual inmate will be kept at the OSP.

In addition to inmates' indefinite retention at the OSP, the Department treats inmates at the OSP qualitatively differently than it treats inmates at other Ohio prisons. With regard to isolation, death row inmates have access to true outdoor recreation and have direct access to attorneys. Most significantly, death row prisoners can interact with other inmates during recreation or by conversations in their cells.

In contrast, inmates at the OSP have extremely limited contact with other individuals. The inmates remain alone in their solid-door cells for twenty-three hours a day. Metal strips along the cell doors do not allow conversation with adjacent inmates. Only a small, inoperable window allows the inmate to view the outside his cell. A correctional officer only opens the small "cuff-port" in the cell door to affix handcuffs or to drop off food. An OSP prisoner only goes outside the building in the rare case of a necessary medical procedure or a court appearance.

Without contradiction, inmate Jason Robb testified that he had not been outside the walls of the OSP for four years:

> Q: I see. When is the last time you were outside the building at OSP?
>
> A: Today was the first time in about four years.
>
> Q: Since the day that you came?
>
> A: Yeah, since the day that I arrived in May of '98, I've never been outside of the institution except for today.

(Robb Test. at 197).



Inmates at the OSP also are never allowed outdoor recreation. Their closest contact to the outdoors is exercise in a completely enclosed room with a grated opening approximately six inches wide and four feet long. The Court finds it hard to believe anyone would seriously suggest such a space constitutes "outdoor" recreation. The lack of outdoor recreation is important to the Court as denial of outdoor recreation can impair a liberty interest:

> Furthermore, deprivation of yard time imposes enough of a hardship to qualify as a constitutionally protected liberty interest. As noted previously, although the plaintiffs were deprived of only two hours of yard time per week, the marginal value of those two hours to a person in Close Management is substantial. Such a deprivation is therefore atypical and significant even in solitary confinement.

*Bass*, 170 F.3d at 1318.

In those instances when the OSP inmates are allowed out of their cells, they are escorted by two or three officers. In contrast, inmates on death row walk without a hands-on escort. At the OSP, when inmates leave their cellblock, they are strip-searched, shackled, and placed in full restraints, which include an uncomfortable rigid "black box" enclosing their hands. Inmates at the OSP are strip-searched before and after meeting visitors even though physical contact with visitors, who are behind solid glass, is impossible. In all, other correctional facilities have significantly less intrusive conditions than the OSP.

In addition, confinement at the OSP affects the duration of some inmates' incarceration. The plaintiffs do not argue

that this impact on parole eligibility creates a liberty interest. Instead, they only argue that it is one factor, among many, showing that placement and retention at the OSP imposes an atypical and significant hardship. The Court agrees.

In *Hewitt*, the Court observed that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate" and hence, the need to maintain the inmate in restricted housing must be subject to meaningful "periodic review" by prison officials. *Hewitt*, 459 U.S. at 477 n.9; *see also U.S. v. Johnson*, 223 F.3d 665, 673 (7th Cir. 2000).

Similarly, in *Mackey v. Dyke*, 29 F.3d 1086 (6th Cir. 1994), a pre-*Sandin* decision, the Sixth Circuit stated that ["there is little difference between depriving a person of liberty without due process of law, on the one hand, and failing to restore someone's liberty after any legal justification for its deprivation has been eliminated, on the other hand." *Mackey*, 29 F.3d at 1090-91 (quoting *Childs v. Pellegrin*, 822 F.2d 1382, 1388 (6th Cir. 1987); *see also Butts v. Dutton*, 878 F.2d 1436, 1989 WL 73653, at *4 (6th Cir. 1989) (stating that *Hewitt* "clearly established" that a prisoner has a due process right not to be confined in administrative segregation as a pretext for indefinite confinement); *Riley v. Johnson*, 528 F. Supp. 333, 340 (E.D. Mich. 1981).

The Department's formal policy stops consideration of parole for prisoners in the high maximum or maximum security classifications. (Pls.' Ex. 3 at 8). To receive parole, an OSP inmate must first be reclassified to maximum security. Once he spends approximately a year at maximum security he may be reclassified to close security and be eligible for parole.



The plaintiffs show convincing evidence of the significant consequences of this rule. Inmates DeJarnette and Heard were both at lower security classifications before being found guilty of misconduct. In both cases, the roles infraction board recommended that they not be sent to the OSP. Their wardens agreed. However, without offering DeJarnette any chance to appear or respond to the issues considered in denying the rule infraction board's recommendation, Chief Ryznar increased DeJarnette's security classification three levels from medium to high maximum.

Similarly, Heard was classified at minimum security facility before involving himself in a conspiracy to import marijuana. After a hearing, the Orient Correctional Institution Rules Infraction Committee recommended a one-level increase to a medium security classification in conjunction with local control punishment. Without a hearing, the Chief Ryznar disregarded the committee's recommendation and increased Heard's security classification four levels to high maximum.

Once in the OSP, DeJarnette and Heard were both denied reductions in their security classification even though they had no significant rule violations. Both inmates were denied reductions even though the OSP's reclassification committee recommended reductions after their reclassification hearings. Chief Ryznar's denial of reclassification has meant years of additional incarceration for DeJarnette and Heard. n24

n24 Discussed below, Chief Ryznar often denies an inmate's reclassification against the recommendation of the committee with minimal explanation. Such

> cursory treatment does not give the inmate any opportunity to challenge the basis for Chief Ryznar's decision or to know what he must do to win a reduction in classification. The defendants' expert on classification, James Austin, testified this is not appropriate: "I mean, you have to give reasonable explanation as to why the person is being kept there." (Austin Test. at 1034).

After considering the total context of confinement at the OSP, the Court finds conditions at the facility impose an atypical and significant hardship. First, the combination of conditions that the OSP inmates face, such as their isolation, the way they are controlled, and their inability to go outside, even for recreation, differs significantly from conditions in other Ohio prisons. Second, the length of confinement under these conditions makes confinement at the OSP atypical. Many inmates have continued in this extremely restrictive environment for four years without explanation.

Therefore, because the conditions at the OSP impose an atypical and significant hardship, the Court holds the inmates have a liberty interest.

B. Minimal Due Process Requirements

Having determined that the plaintiffs have a liberty interest; the Court now turns to a discussion of what process the plaintiffs were due before the defendants sent them to the OSP.

The Supreme Court's decisions in *Wolff* and *Hewitt* describe the procedural safeguards afforded to prisoners who have demonstrated protected liberty interests. In *Wolff*, a prisoner alleged the procedures surrounding the disciplinary



proceedings used to revoke his good time credits violated his due process rights. In fashioning the procedures needed to protect the prisoner's due process rights, the Court introduced a balancing test weighing "institutional needs and objectives" against "the provisions of the Constitution that are of general application." *Wolff*, 418 U.S. at 556. The Court found that certain procedures were necessary if the "minimum requirements of procedural due process [were] to be satisfied." *Id.* at 563.

Under *Wolff*, a prisoner must receive "advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Id.* Regarding the timing of the notice, *Wolff* held that "a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee." *Id.* at 564. The inmate must be allowed to appear at the hearing and be allowed adequate time to prepare a defense. *See id.* The inmate should also be allowed to call witnesses and present documentary evidence as long as "permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.* at 566. However, the ability to present a defense does not extend to the right to cross-examination or confrontation. *See id.* at 567-68. Nor is the inmate entitled to the right to counsel. *See id.* at 569-70.

In *Wolff*, the Court also found that due process required the disciplinary body give some explanation for the action ultimately taken:

> We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action.

Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," and they are certainly likely to be considered by the state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others.

*Id.* at 564-65 (internal citations omitted).

Furthermore, *Wolff* held that such procedural requirements were not limited to disciplinary proceedings dealing with time credits, but extended to disciplinary proceedings for segregation as well. *See id.* at 571 n.19. The Court held that "although the complaint put at issue the procedures employed with respect to the deprivation of good time, . . . the same procedures are employed where disciplinary confinement is imposed." *Id.*



In contrast, *Hewitt* considered the amount of process due a prisoner when prison officials transferred him to restrictive confinement for the "administrative," rather than the disciplinary, reason of investigating his role in a prison riot. Reviewing whether he was afforded due process in this administrative segregation, the Court gave prison authorities greater deference:

> We think an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation . . . So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.

*Hewitt*, 459 U.S. at 476. Although a hearing need not occur prior to confinement in administrative segregation, it "must occur within a reasonable time following an inmate's transfer." *Id.* at 476 n.8.

*Hewitt* also requires periodic review of an inmate in administrative segregation.

> Administrative segregation may not be used as a pretext for indefinite confinement of an inmate.

> Prison officials must engage in some sort of periodic review of the confinement of such inmates. This review will not necessarily require that prison officials permit the submission of any additional evidence or statements. The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner—which will have been ascertained when determining to confine the inmate to administrative segregation—and on the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for "proof" in any highly structured manner.

*Hewitt*, 459 U.S. at 477 n.9.

Under *Wolff* and *Hewitt*, the amount of process a prisoner requires depends on whether the prisoner's transfer is characterized as disciplinary or administrative. In deciding the nature of the transfer, nomenclature is less important than the substance of the transfer. Regardless of the defendants' characterization of the transfer and retention of inmates at the OSP, it is not clear that all transfers to the OSP were administrative.

*Hewitt* involved the administrative segregation of an inmate for a relatively short period of time during an investigation into the cause of a prison riot. Once the investigation was complete, the inmate was found guilty of two misconduct charges. *Hewitt*, 459 U.S. at 464-65. Because the inmate in *Hewitt* was to face a rule infraction board and have the increased procedural protections associated with that disciplinary entity, he had less interest in procedural protections for the short time that prison



authorities sent him to administrative control pending the investigation.

On the other hand, placement or retention at the OSP is for a significantly longer time than the temporary administrative segregation at issue in *Hewitt*. In addition, the inmate in *Hewitt* was eventually afforded a hearing marked by the more rigorous due process protections that accompany disciplinary segregation. In contrast, prisoners assigned to the OSP, especially those segregated for alleged gang affiliations, at best receive only one hearing before their transfer to the OSP. In light of the lengthy and indeterminate time inmates are held at the OSP, the minimal procedural requirements of *Hewitt* are insufficient.

An additional consideration for affording OSP inmates increased procedural protections is that inmates facing disciplinary control face less punishment than inmates facing placement at the OSP. In *Wolff*, the Court established heightened procedural protections for inmates facing disciplinary or punitive proceedings. Currently, inmates appearing before rule infraction boards are entitled to these heightened protections even though the possible sanctions are less than the consequences of assignment to the OSP. Serious rule violation "may be penalized by disciplinary isolation and/or suspension of privileges and qualified rights for a period up to thirty days." Ohio Admin. Code § 5120:1-8-13(C)(2) (2001). "The maximum penalty for rule violations arising from one incident must be no more than sixty days." Ohio Admin. Code § 5120:1-8-13(D) (2001). Inmates transferred to the OSP face conditions more severe than a prisoner in disciplinary segregation and will face them for a much greater period of time. Therefore, at a minimum, inmates at the OSP should be afforded the same procedural protections as those described in *Wolff*.

Further support that the OSP inmates are entitled to the protections described in *Wolff* is found in the underlying factors that govern all decisions regarding what process an individual is due. In *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), the Court set forth three factors to consider when deciding what procedural protections an individual requires. First, courts consider the private interest affected by the state action. *Mathews*, 424 U.S. at 335. Second, courts consider how great the risk is that the procedures used will come to an erroneous decision, and whether additional procedural protections would sufficiently reduce a risk of mistake. *Id.* Finally, courts consider the government's interest, including whether additional procedural protections would place undue fiscal and administrative burdens upon the state. *Id.; see also Washington v. Harper*, 494 U.S. 210, 229, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) ("The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case.").

As discussed above, the Court has found that confinement at the OSP imposes an atypical and significant hardship when compared to confinement in other Ohio prisons. Therefore, placement and retention at the OSP substantially affects one of the most basic private interests of the OSP inmates.

As it currently exists, the Department's procedure for selecting and retaining inmates at the OSP has great potential for error. Evidence at trial demonstrated a wide disparity between the recommendations of the reclassification committee, the OSP's warden, Chief Ryznar, and the North Regional Director. The potential for error is magnified by



the fact that the North Regional Director, a single individual with responsibilities throughout the entire Department, is given the last decision on placement and retention at the OSP. The potential for error is little improved under the newly proposed system because it merely gives the final decision to the chief of the Bureau of Classification, an individual who also has a multitude of responsibilities and little time to consider each case carefully.

Take the cases of inmates Roe and Thompson. For both, the decision to transfer them to the OSP arose from gang related incidents at the Southern Ohio Correctional Facility in 1999. With essentially no evidence showing that Roe or Thompson were connected to the gang related tension, Chief Ryznar and North Regional Director Huffman nevertheless sent them to the OSP. Roe and Thompson remain at the OSP even with no evidence of current gang activity. Against this backdrop, additional procedural safeguards would, at little cost, reduce the potential of erroneous deprivation.

Next, additional procedural protections would not impair legitimate governmental interests and would place little additional administrative burden upon the state. The OSP aims to house only the most dangerous prisoners in Ohio's correctional system. Additional process advances the state's interest by consistently sending only those inmates who truly are "the worst of the worst" to the OSP. Parole Board Member Peter Davis best described the risk:

> The only thing that's clear is, as I've said here, for every inmate that was cited to me and the reasons why that person was sent there, for this particular act, this assaultive behavior, if you will, we knew for a fact of plenty other inmates

that were at other institutions, even close security institutions, that were not transferred [to the OSP].

(Davis Test. at 126). n25

n25 Peter Davis was the executive director of the Ohio General Assembly's Correctional Institution Inspection Committee. Davis's comment is in the context of questions about his December 8, 1999, inspection report on the OSP, prepared for the Ohio General Assembly. (Pls.' Ex. 11). That report, after commenting on the subjectivity of the supermax placement process, concluded:

> Serious questions remain as to how adequate, proper, fair and objective are the decisions to identify, justify and assign selected inmates to supermax. Still needed is a "clearer, more precise understanding of the working distinctions" among decisions to assign inmates to either high maximum, or to maximum [general population], or to maximum Administrative Control or to high close security.

(Pls.' Ex. 11 at 10).

Requiring Department officials to give inmates specific notice of all the grounds for placing and retaining them at the OSP would cause minimal hardship. The officials would only need to expend the additional time to write out their reasons



for making a specific classification decision. Furthermore, this minimal amount of additional time would increase the Department's efficiency. Accurately summarizing all the grounds supporting an inmate's placement at the OSP would assist later reviewing entities and avoid unnecessary prisoner assignments to the OSP.

In addition to ensuring that only inmates presenting a serious risk to others or to the operation of the Department are housed at the OSP, increased procedural protections will ensure that inmates that can safely be housed elsewhere at cheaper cost will not be sent to the OSP. With the exception of the Corrections Medical Center (providing inpatient hospital treatment) and the Oakwood Correctional Facility (providing inpatient psychiatric treatment), the OSP has the highest annual cost per inmate in the Ohio prison system. *See generally* Ohio Dep't of Rehab. & Corr., *The Institutions, at* http://www.drc.state.oh.us/web/prisprog.htm (last modified Feb. 5, 2002). n26 In all, any additional procedural protections at the selection and retention stages add little in administrative costs and benefit everyone by avoiding mistaken, and costly, placement at the OSP.

n26 The OSP's higher cost is in part because it uses a higher staff-to-inmate ratio than used at other Ohio prisons. Also, unlike other prisons that have inmates prepare and serve food, inmates at the OSP do not perform any of the operational functions of the prison.

Because of the liberty interest involved resulting from the length and the conditions of confinement at the OSP, and the Court's discussion of the *Mathews* factors, the Court holds that the plaintiffs are entitled to the minimal procedural requirements announced in *Wolff*. In summary, before an

inmate attends a hearing to determine if he will be reclassified to high maximum (1) the inmate is entitled to twenty-four advance written notice of all the specific evidence relied upon to support the reasons for his reclassification; (2) the inmate must be allowed to appear at the reclassification hearing and present evidence, including witnesses and documents, in support of his position; n27 and (3) the reclassification committee must issue a written statement specifically describing the evidence relied on the reasons for its recommendation.

n27 Inmates are entitled to call witnesses and have them testify at their hearing as long as doing so does not "unduly hazardous to institutional safety or correctional goals." *Wolff*, 418 U.S. at 566; *King v. Wells*, 760 F.2d 89, 93 (6th Cir. 1985). Prison officials choosing to exclude a witness must have a reason based on a the specific facts of the case. *See King*, 760 F.2d at 93. This requirement is meant to strike the balance identified in *Wolff* between an inmate's due process rights and the Department's need for discretion in order to operate safely its correctional institutions.

In listing these requirements, the Court notes that notice given to an inmate must be more than a mere formality. *See Benitez v. Wolff*, 985 F.2d 662, 665 (2d Cir. 1993). Instead, the inmate should know what he is accused of so that he can prepare a defense to those charges and not be made to explain away vague allegations. *See McKinnon v. Patterson*, 568 F.2d 930, 940 n.11 (2d Cir. 1977).

The inmate should also have the right to offer evidence and argument to the person who, in fact, makes the decision on his reclassification. Even in *Hewitt*, the prisoner was to receive "an opportunity to present his views to the prison



official charged with deciding whether to transfer him to administrative segregation." *Hewitt*, 459 U.S. at 476. The procedural requirements the Court lists "are not elaborate, but they are real, and must be strictly complied with." *Brown*, 131 F.3d at 171.

C. Due Process Afforded to the Plaintiffs

The Court now turns to the question of whether the plaintiffs were afforded the process they were due. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). A hearing is not "meaningful" if a prisoner is given inadequate information about the basis of the charges against him. *See Brown*, 131 F.3d at 172 ("If [an inmate] was not provided an accurate picture of what was at stake in the hearing, then he was not given his due process.").

The defendants did not give notice to the majority of inmates transferred to the OSP between August 1998 and October 2000. Instead, inmates were awoken in the early morning hours and shipped off to the OSP. This denial of notice was intentional, apparently because Department officials believed the transfers would be easier to make. n28 In addition, most of the class members were never told of the grounds used to support their incarceration at the OSP. Similarly, after reviewing the reclassification committee's recommendations, Department officials frequently fail to tell inmates about the evidence used to support the denial of their reclassification to maximum security.

n28 Defendant Huffman served as the warden of the Southern Ohio Correctional Facility during many of the transfers. He testified:

> We were concerned about security of transporting the inmates, so at that time we did not tell them where they were going as far as the transport.

(Huffman Test. at 1138).

Inmate Roe again serves as an example. On January 20, 1999, Roe appeared for an annual review while incarcerated at the maximum security Southern Ohio Correctional Facility. While his behavior worksheet score indicated that a security level decrease was appropriate, that the reclassification committee recommended his security classification be increased from maximum to high maximum. The reclassification committee also noted that Roe had no violent conviction or infraction within the previous twenty-four months. As justification for sending Roe to the OSP, the committee stated that he was a "long standing member of the [Aryan Brotherhood]. Participated in a racial disturbance over 5 years ago." (Pls'. Ex. Roe-2 at 2). Roe was sent to the OSP even though four days after his hearing he was assaulted but did not respond with violence. In fact, there was some testimony that Roe's assault was evidence he was a gang leader because higher level gang members were being targeted at that time.

The Department's justification does not approach the necessary process to which Roe was entitled. The Department chose to move Roe to a more secure and more expensive facility without articulating a single affirmative



action he had undertaken. Instead, he was allegedly moved because of longtime gang membership and his involvement in a racial incident more than five years ago. These justifications ring hollow as the Department did not transfer Roe to the OSP when it opened in May 1998. If the Department's stated reasons made Roe an immediate threat, it seems reasonable to expect he would have been moved to the OSP shortly after it opened. Instead, the Department waited eight months. Thus, the defendants' failure to inform Roe of the reasons for his transfer or to afford Roe the opportunity to refute those reasons violated due process.

Roe faired no better in his reclassification hearings while at the OSP. Policy 111-07 recommends high maximum classification for an individual who "presents the highest level of threat to the security and order of the department and its institutions" or "functions as a leader or enforcer of a security threat group." (Pls.' Ex. 2 at 2). The defendants never gave notice to Roe of the evidence they relied on to meet Policy 111-07's requirements. After having heard evidence in a closed session, the Court finds the Department has failed to show that Roe functions as a leader or enforcer of the Aryan Brotherhood.

Inmate Thompson was similarly deprived of due process. On January 20, 1999, Thompson had a classification review. The hearing committee's worksheet indicated that Thompson had no rules violation findings, no administrative control placement, and no violence in the last five years. (Pls.' Ex. Thompson-2). At about the same time, Thompson was present at a fight in the Southern Ohio Correctional Facility involving members of rival gangs. Thompson was not brought before the rule infraction board for that incident, and the Department's confidential security threat group file on Thompson makes no mention of what role, if any,

Thompson played in the fight. Nonetheless, without any notice of the evidence claimed against him, the Department sent Thompson to the OSP.

The Department has also failed to give Thompson notice of the evidence used to keep him at the OSP. In subsequent reclassification committee hearings, the defendants did not give any notice of specific allegations that would prevent Thompson from being reclassified. While at the OSP, Thompson received no rule infraction citations. In both 2000 and 2001, the reclassification committee recommended that Thompson's security classification be reduced, indicating that his adjustment was good, he had received no tickets, and nothing at the OSP suggested gang affiliation. (Pls.' Exs. Thompson-4, -6). However, in both 2000 and 2001, the committee's recommendations were denied because of Thompson's alleged gang membership. (Pls.' Exs. Thompson-4, -5, -6).

Thompson never had an opportunity to respond to the evidence used to keep him at the OSP because he never received notice. Having reviewed the Department's evidence against Thompson in closed session, the Court does not see any evidence indicating that Thompson is a leader or enforcer of a security threat group. Thompson was denied due process by the Department's failure to provide any reasonable notice of the evidence supporting its decision to keep him in the OSP.

Many other inmates at the OSP have not received appropriate due process. In a twelve-month period reviewed by James Austin, the defendants' expert, 369 OSP inmates had reclassification hearings. Of the 369 reviewed, the reclassification committee recommended a security level reduction for 157 inmates (43%). (Defs.' Ex. O at 9). The



OSP's warden recommended eighty-eight inmates (24%) for a reduction in classification, while Chief Ryznar recommended ninety inmates (24%) for reclassification. (Defs.' Ex. O at 9). The Regional Director ultimately reclassified only seventy-one inmates (19%). (Defs.' Ex. O at 9). While a representative of the OSP's warden sits on the reclassification committee, the vast majority of inmates never had an opportunity to present evidence or argument to Chief Ryznar or the North Regional Director. Therefore, eighty-six inmates never were able to address the person responsible for making the final judgment on their retention at the OSP. Furthermore, in most cases, Chief Ryznar and the North Regional Director merely give a one- or two-sentence explanation for their decisions. Even if an inmate were able to see this explanation, such a cursory statement would not adequately inform him of evidence justifying the reviewer's decision.

In sum, the Court finds that the defendants have denied the plaintiffs due process in a number of ways. First, the defendants failed to afford a large number of inmates notice and an adequate opportunity to be heard before placing them at the OSP. Second, the defendants failed to give the plaintiffs sufficient notice of the grounds serving as the basis for their retention at the OSP. Third, the defendants have failed to give the plaintiffs sufficient opportunity to understand the reasoning and evidence used to retain them at the OSP. The Court now turns to what remedy is appropriate.

III. The Plaintiffs' Remedy

In April 1996, Congress enacted the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996). The PLRA limits the ability of federal courts to

affect the capacity and conditions of prisons beyond what is required by the Constitution and federal law. *See Hadix v. Johnson*, 228 F.3d 662, 665 (6th Cir. 2000).

Specifically, the PLRA restricts the entry of prospective relief in suits challenging the constitutionality of prison conditions, providing:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. *The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.* The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A) (1999) (emphasis added). The term "prospective relief" is defined as "all relief other than compensatory money damages." 18 U.S.C. § 3626(g)(7) (1999). Any prospective relief ordered by the Court would terminate in two years upon the motion of either party unless the Court finds the prospective relief is needed "to correct and [sic] ongoing violation of the Federal right." 18 U.S.C. § 3626(b)(1)(A)(i).

The defendants argue that prospective relief is unnecessary because they have adopted new policies that correct any earlier problems. On January 3, 2002, Director Wilkinson approved a new version of Policy 111-07 ("New



Policy 111-07"), effective on March 1, 2002. While New Policy 111-07 improves upon the Department's placement and retention policies in major ways, the Court finds that it still fails to provide adequate due process in certain particulars. n29

> n29 Among other things, New Policy 111-07 changed the nomenclature describing the Department's security classifications. Instead of security classifications called maximum and high maximum, New Policy 111-07 has Level 4 and Level 5, respectively. (Defs.' Ex. C at 1). Also, instead of an inmate entering the OSP at Level II and having to progress to Level III before being able to transfer to a maximum security prison, under New Policy 111-07, an inmate enters the OSP at Privilege Level B and must progress to Privilege Level A before having the opportunity to transfer to a classification Level 4 facility. (Defs.' Ex. C at 1, 2, 6).

In contrast to how inmates were initially transferred to the OSP in the past, New Policy 111-07 requires an inmate be given forty-eight hour notice and an opportunity to appear before the classification committee before being sent to the OSP. (Defs.' Ex. C at 5). Inmates learn of their hearings by receipt of Form 2598, a formal Notice of Hearing. (Defs.' Ex. C at 5). However, Form 2598 does not ensure that inmates are given notice of the evidence relied upon and the specific grounds for which they are being considered for placement at the OSP. The form simply states, "you were referred to the Classification Committee for the following reason(s)" and has several blank lines to be filled in by the prison official. (Defs.' Ex. C). As currently written, nothing in New Policy 111-07 or Form 2598 requires the Department to inform an

inmate of all the reasons the classification committee may recommend him for Level 5 placement.

Instead, the notice would be appropriate if the form said something like, "you are being considered for Level 5 placement at the Ohio State Penitentiary for the following reason(s)," and the classification committee then limited its consideration of Level 5 placement to the listed reasons and evidence. Such a system that ensures the inmate can adequately prepare for his hearing. He would be given notice of all grounds that could cause his reclassification.

New Policy 111-07 also fails because it is insufficiently specific regarding offenses that can lead to placement at the OSP. Under section 6(c)(4) of New Policy 111-07, an inmate meets a Level 5 placement criteria if the "inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. This includes but is not limited to . . . drugs for distribution." (Defs.' Ex. C at 4). By failing to specify a threshold quantity, this criteria gives insufficient notice of what conduct could lead to Level 5 placement.

This lack of specificity could easily have been corrected. For example, New Policy 111-07 could define the "drugs for distribution" criteria to coincide with the drug amount required to sentence an inmate to a third degree felony. n30 Regardless of the reasonable drug quantity the Department chooses, inmates should be given specific notice of the amount.

n30 The amount of cocaine required to support a third degree drug trafficking charge is as follows:



> If the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, trafficking in cocaine is a felony of the third degree . . . .

Ohio Rev. Code § 2925.03(C)(4)(d) (2001).

New Policy 111-07 is also unnecessarily vague regarding the type of gang involvement that may subject an inmate to incarceration at the OSP. The current Policy 111-07 stated that an inmate prisoner could be placed at the OSP if "the inmate functions as a leader or enforcer of a security threat group." (Pls.' Ex. 2 at 2). The new policy actually lessens an inmate's ability to learn what conduct is forbidden and what conduct may cause them to be placed at the OSP. Section 6(C)(5) of New Policy 111-07 says that an inmate meets a Level 5 criteria if "the inmate has been identified by the institution Security Threat Group Coordinator as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior." (Defs.' Ex. C at 4).

The problem with this criteria is that it merely requires a security threat group coordinator to believe that an inmate is a leader, enforcer, or recruiter. In essence, an inmate could never adequately respond to a charge that someone had "identified" him as a member of a security threat group without knowing on what specific evidence the identification was based.

The defendants can easily correct this criteria's deficiency by requiring that the person seeking an inmate's Level 5 placement present evidence to the classification committee that the inmate is a leader, enforcer, or recruiter of a security threat group actively involved in violent or disruptive behavior. Stated another way, the Department would need to establish to the reclassification committee's satisfaction that the inmate actually was a leader, enforcer, or recruiter of a gang involved in violent or disruptive behavior. While the defendants must give an inmate sufficient notice of any gang affiliated claims the Department is relying upon to send him to the OSP, the Court recognizes that prison officials have discretion regarding sensitive information "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." *Wolff*, 418 U.S. at 566.

There is one additional way New Policy 111-07 fails to provide adequate due process. Under the current policy, Chief Ryznar and the North Regional Director often make an inmate's final classification decision without giving him any notice of the factors that they are considering. In general, but especially in cases regarding gang affiliation, the evidence at trial showed that Chief Ryznar frequently made decisions on an inmate's classification based on evidence and arguments never disclosed to the inmate.

While an improvement over the current policy, New Policy 111-07 also fails to require that the true decision maker identify the evidence he relied upon and explain the reasoning behind his decision. Section 6(C) of the new policy states that "the Bureau of Classification will review the



[warden's] recommendation and any objection filed by the inmate, and make a final decision." (Defs.' Ex. C at 5). By failing to require the Bureau of Classification to issue an explanation of its decision, the new policy ignores the procedural requirement "that there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." *Wolff*, 418 U.S. at 564-65 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)).

Again, the new policy's failure to afford due process could be easily solved. *Wolff* requires the fact finder issue a written statement of the facts relied upon and the reasoning used. This written statement should address an inmate's specific case and not contain merely vague boilerplate language. If New Policy 111-07 required the Bureau of Classification to describe the specific facts found and the reasoning used to support an inmate's placement at the OSP, it would afford sufficient due process.

Besides changing the procedures for initial placement at the OSP, New Policy 111-07 changes the procedures and standards used to review an inmate's retention at the OSP. The importance of affording inmates due process at their reclassification hearings cannot be overstated. The Department transferred almost two hundred prisoners to the OSP from 1998 through early 1999 who are still at the facility and have never received an adequate hearing concerning their placement at the OSP. Reclassification under the current policy suffers from the same problems as the initial placement hearings. The reclassification committee's recommendations are often cursorily denied by someone for reasons the inmate never knew were at issue.

Under the new policy, the Department changes the procedures for reclassification reviews. One improvement is that the final decision for reclassification rests with the Bureau of Classification rather than with the North Regional Director. While New Policy 111-07 represents an improvement over current policy, it still does not afford inmates adequate due process regarding their retention at the OSP.

First, New Policy 111-07 does not call for any information to be given to the inmate prior to the hearing. The policy simply requires that the inmate be given forty-eight hours notice of his hearing and be afforded an opportunity to appear and to give information to the reclassification committee. (Defs.' Ex. C at 9). While the committee appropriately considers a completed Form 2634 n31 for each inmate, the inmates are not given the form before the reclassification committee hearing. The inmates receive no notice of the grounds claimed to support their retention at the OSP.

> n31 Form 2634 contains administrative information about an inmate including his time to earliest possible release, his original crime, the basis for his admission to Level 5, a summary of his conduct since admitted to Level 5, and the number of conduct reports he received since arriving at the OSP.

Second, while New Policy 111-07 has only minor deficiencies when it comes to identifying sufficiently the type of conduct that could send an inmate in the OSP, it is much worse at describing the specific conduct necessary for an inmate to leave the OSP.



> It is a fundamental precept of constitutional law, as well as "ordinary notions of fair play" that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

*Rios v. Lane*, 812 F.2d 1032, 1038 (7th Cir. 1987) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926)). Adequate notice of conduct that could lead to sanctions is important if inmates are to "steer away from prohibited conduct, unentangled by the trappings of poorly delineated prison regulations." 812 F.2d at 1039.

The new policy provides a long list of information the reclassification committee will consider, but in the end the only standard governing the committee is "whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security." (Defs.' Ex. C at 9-10). This lack of a defined standard is troubling because New Policy 111-07 also does not require the ultimate decisionmaker to explain why an inmate's reclassification is denied. New Policy 111-07 calls for a hearing before the reclassification committee and provides that:

> The committee shall make a recommendation to reduce or continue the inmate's security level accordingly. The committee shall identify the basis for its decision and the factors relied upon. If the committee believes the inmate presents a threat to security of a general population institution, the committee shall document their conclusions as to the inmate's risk and their reasons.

> The classification committee shall forward its recommendation to the Warden/Designee . . . . If the warden approves the recommendation, he or she shall submit the recommendation and the approval to the Bureau of Classification for final disposition . . . . The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a decision.

(Defs.' Ex. C at 10).

Just as with the initial placement hearings, New Policy 111-07 vests final authority with the Bureau of Classification. Under the current policy, Chief Ryznar denied the reclassification committee's recommendation for a reduced classification in nearly half of the cases he saw. The evidence presented at trial, especially in Roe's and Thompson's cases, raises questions about the adequacy of the justifications Chief Ryznar used to make his decisions. Still, under the new policy, the Bureau of Classification would still not be required to give any explanation for denying an inmate reclassification. Once again, the new policy ignores the procedural requirement "that there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." *Wolff*, 418 U.S. at 564-65 (quoting *Morrissey*, 408 U.S. at 489).

As before, the new policy's due process deficiency is easily correctable. In reviewing both placement and reclassification decisions, the Bureau of Classification should set out the evidence it relied upon and the reasons for its decision. This information should be set out in sufficient detail to show the inmates the evidence that was actually



considered and that a reasoned judgment was made. The use of boilerplate language and form decisions does not show a reasoned consideration of the facts of the case necessary to afford an inmate due process.

IV. Conclusion

As described, the Court finds that the plaintiff inmates have a liberty interest entitled to constitutional protection. Because of the length of placement in its severely restrictive conditions, incarceration at the OSP imposes an atypical and a significant hardship upon inmates. The defendants have violated the plaintiff class's right to due process by denying the plaintiffs adequate notice, adequate hearing, and sufficiently detailed decisions.

Having found that the defendants violated, and will continue to violate, the plaintiffs' constitutionally protected liberty interest, the Court orders the parties to file, within fourteen days of the publication of this judgment, proposed injunctive orders, extending no further than necessary to correct the violation of the federal right set out in this opinion in a way that is the least intrusive means to correct the violation.

IT IS SO ORDERED.

Date: February 25, 2002

*/s/*
James S. Gwin
United States District Judge

**APPENDIX E**

**STATE OF OHIO**

**DEPARTMENT OF REHABILITATION AND CORRECTION**

| | |
|---|---|
| SUBJECT:<br>LEVEL 4 / LEVEL 5 CLASSIFICATION FOR MALE INMATES | PAGE 1 OF 12<br>SECTION: 111-<br>NUMBER: 07 |
| RULE/CODE REFERENCE: | SUPERCEDES:<br>111-07 DATED 01/28/99 |
| RELATED ACA STANDARDS | EFFECTIVE DATE:<br>**March 1, 2002** |
| RELATED AUDIT STANDARDS: | APPROVED: January 3, 2002 |

**I. AUTHORITY:**

This policy is issued in compliance with Ohio Revised Code Section 5120.01 which delegates to the Director of the Ohio Department of Rehabilitation and Correction the authority to manage and direct the total operations of the Department and to establish such rules and regulations as he prescribes.

**II. PURPOSE:**

The purpose of this policy is to define the classification procedures for placing inmates in Level 4 and Level 5 security classifications.





**III. APPLICABILITY:**

This policy applies to all staff and male inmates involved in the classification process.

**IV. DEFINITIONS:**

Classification Level 4 – A security level for inmates who are involved in, but not leading others to commit violent, disruptive, predatory or riotous actions, and/or a threat to the security of the institution as set forth in the established Level 4 criteria. This classification replaces the classification previously known as "maximum security." References to maximum security in the Administrative Code and other policies shall be construed as the equivalent of level 4.

Classification Level 5 – A security level for inmates who commit or lead others to commit violent, disruptive, predatory, riotous actions, or who otherwise pose a serious threat to the security of the institution as set forth in the established Level 5 criteria. This classification replaces the classification previously known as "high maximum security." References to "high maximum security" in the Administrative Code and other policies shall be construed as the equivalent of "level 5."

Privilege Level B – The initial privilege level assigned to an inmate classified into Levels 4 or 5.

Privilege Level A – A less restrictive privilege level, which inmates may be placed into by the Privilege Level Review Committee, after a review of the inmate's status in Levels 4 or 5.

Seriously Mentally Ill—Serious mental illness means a substantial disorder of thought or mood which significantly impairs judgement, behavior, capacity to recognize reality or cope with the ordinary
demands of life within the prison environment and is manifested by substantial pain or disability. Serious mental illness requires a mental health diagnosis, prognosis and treatment, as appropriate, by mental health staff.

## V. POLICY:

It is the policy and objective of the classification level system to create a process for the classification of inmates according to their security risk. This process shall consider behavior and such other objective factors as are available and relevant when assessing an inmate's institutional security needs. Inmates shall be placed at the lowest level of security possible that is still sufficient to ensure the safety and security of persons, the institution and the community. Inmates shall be placed at institutions that are consistent with their security classification rating. Inmates who classified as level five and are determined to be seriously mentally ill shall not be housed at the Ohio State Penitentiary but shall be housed at another facility as determined by the Director.

## VI. PROCEDURES:

### A. Placement in Level 4 or 5 from Reception

Inmates may be placed at Level 4 or 5 from Reception, based upon the results of the scoring of



the Security Designation Form by the Reception Coordinator, recommended by the Warden/Designee and approved by the Bureau of Classification. The Reception Coordinator shall use the Security Designation Long Forms, referenced at the end of this directive.

### B. Placement in Level 4:

The Warden, Deputy Warden, Major, Unit Management Administrator (UMA), Unit Manager, Rules Infraction Board (RIB), or Reception Coordinator may initiate placement into the Level 4 Classifications. If the Department has already made an initial assignment following reception, the person initiating the placement shall use the Supervision Review Forms, referenced at the end of this directive. Once initiated, the Warden/Designee shall establish a classification committee pursuant to rule 5120-9-53 of the Administrative Code to review the inmate's behavior and determine if the inmate meets one or more of the following Level 4 criteria:

1. The inmate has demonstrated physically assaultive and/or predatory behavior resulting in physical harm/injury to any person.
2. The nature of the inmate's behavior presents a current threat to the security and orderly operation of the institution and safety of others.
3. The inmate has planned or participated in a serious disturbance or riot.
4. The inmate has possessed major contraband which poses a threat or danger to the institution. This includes but is not limited to: weapons,

drugs, escape contraband, large amounts of currency.

5. The inmate has been identified by the institution Security Threat Group Coordinator as an active member involved in disruptive security threat group behavior.
6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level 1 or 2 (or their equivalent, minimum or medium) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.
7. The inmate has established an inappropriate relationship with a staff member.
8. The inmate through repetitive and/or seriously disruptive behavior has demonstrated an inability to adjust to Level 3 as evidenced by repeated class II rule violations.

The classification committee shall review the completed Supervision Review Form and any relevant information. The inmate is to be served with a Notice of Hearing Form (Form DRC2598) 48 hours prior to the hearing, and afforded the opportunity to appear before the entire committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 4 placement.

The inmate will also be afforded the opportunity to submit a written statement to the committee. The classification committee shall determine whether the inmate has met one of the criteria above and whether the inmate should be placed in level 4. The classification committee shall make a recommendation



accordingly.

The Classification committee shall forward its recommendation to the Warden/Designee. The Warden/Designee shall review the Supervision Review Form and all other information presented, and approve or disapprove the recommendation. If the warden approves the recommendation for level 4, he or she shall submit the recommendation to the Bureau of Classification for final disposition. The inmate may file a formal objection to the recommendation of the classification committee and warden with the Bureau of Classification within fifteen days. The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a final decision.

**C. Placement in Level 5:**

Placement into the Level 5 classification may be initiated by the Warden, Deputy Warden, Major, UMA, Unit Manager, RIB or the Reception Coordinator. The person initiating the placement shall use the Security Designation Long Form, referenced at the end of this directive. Once initiated, the Warden/Designee shall establish a classification committee to review the inmate's behavior and determine if the inmate meets one or more of the following Level 5 criteria:

1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in either serious physical injury or death to any person, or in an attempt to sexually assault any person, or to cause serious physical injury or death to any person. An inmate has demonstrated

such behavior when the inmate has:

- Physically assaulted another resulting in serious physical harm;
- Assaulted or attempted to assault another with a deadly weapon
- Compelled or attempted to compel another to perform sexual acts; engage in sexual conduct or sexual contact; or to submit to sexual contact; all by force or threat of force;
- Compelled or coerced another, by force or the threat of serious physical harm or death, to provide anything of value, to perform any act, or to violate any rule.

2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.
3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.
4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. This includes but is not limited to:
   - Deadly weapons
   - Ammunition
   - Escape instruments
   - Drugs for distribution
5. The inmate has been identified by the institution Security Threat Group Coordinator as a leader,



enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.

6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four (or their equivalent, close or maximum) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.
7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution.
8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis.
9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

The classification committee shall review the completed Supervision Review Form and any other relevant information. The inmate is to be served with a Notice of Hearing (Form DRC2598) 48 hours prior to the hearing, and afforded the opportunity to appear before the entire committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 5 placement. The inmate will also be afforded the opportunity to submit a written statement to the committee. The classification committee shall document information presented by staff and the inmate (Forms DRC2627 and DRC2628). The classification committee shall determine whether

the inmate has met one of the criteria above and whether the inmate should be placed in level 5. The classification committee shall make a recommendation accordingly, which shall be documented on the Classification Committee Report (Forms DRC2637, DRC2638, DRC2639).

The classification committee shall forward its recommendation to the Warden/Designee. The Warden/Designee shall review the Supervision Review Form and all other information presented, and approve or disapprove the recommendation. If the Warden approves the recommendation, he or she shall submit the recommendation and the approval to the Bureau of Classification for final disposition.

The inmate shall be notified of the warden's approval of the recommendation and may file a formal objection to the recommendations of the classification committee and warden with the Bureau of Classification within fifteen days of the date he is served with the committee's recommendation and warden's action. The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a final decision.

No inmate will be placed in level 5 who is determined to be seriously mentally ill, pursuant to the procedures of the department's bureau of mental health; or whose medical needs are inconsistent with that assignment, pursuant to Policy Directive 320-15, "Medical Classification."



**D. Placement in Level 5 from Level 4**

A classification Committee shall review the inmate's behavior and determine if the inmate meets at least one of the criteria for Level 5.

If the inmate's repetitive and/or seriously disruptive behavior has demonstrated a chronic inability to adjust to level 4B, the documentation must clearly reflect this. The classification committee must ensure that the documentation includes any repeated class II rule violations, information and/or descriptions of the inmate's behavior and how the behavior disrupted the operation of the housing unit, facility or its operation. For example:

- List any rule violations with dispositions and the dates of any violations within the previous twelve months.
- Detail the number of times it was necessary to use force to restrain or control the inmate.
- List the instances of disruptions to meal, recreation, shower or scheduled activities, etc.
- Detail the impact on other inmates, threats, disruptions, etc.

The classification committee shall complete the process as described in subsection C., above.

**E. 30 Day Review/Orientation Process**

Placement into Level 4 or Level 5 varies in length depending on the nature of the initiating incident, criteria for placement, and/or demonstrated behavior in assigned level. All inmates placed into these levels shall

have a review of their classification level completed by an assigned Unit staff member within 30 days of placement to determine if they have been properly classified. This review shall include a review of the inmate's file to ensure that proper documentation has been included detailing how/why the inmate has been classified into Level 4 or Level 5.

If the review finds that the inmate meets the appropriate criteria, Unit and/or programming staff will meet with the inmate to explain the classification and review processes and what the expectations are concerning his behavior, and appropriate program participation. This meeting will also afford the inmate the opportunity to request any needed assistance while assigned in the classification level. Staff will advise the inmate whether release to a general population institution in three years or less appears reasonably possible.

If the review finds that the inmate does not meet the Level 4 or Level 5 criteria, the reviewing staff member shall forward a written recommendation through the Deputy Warden of Operations, to the Warden recommending that the inmate be transferred to an appropriate institution. The reasons for the recommendation must be listed to reflect why the inmate is not appropriate for Level 4 or Level 5 and is more appropriate for another level.

If the Warden concurs with the recommendation, the packet will then be forwarded, along with a newly completed Supervision Review Form, to the Bureau of Classification for appropriate action. If the Warden disagrees with the committee's recommendation, the inmate remains at his current status and this decision is



not appeallable.

**F. Privilege Level Review Process**

Inmates placed into Level 4 or 5 will initially be assigned to privilege level B (5B or 4B). They will remain in this level until recommended for reduction by the Privilege Level Review Committee, and approved by the Warden/Designee. Reductions from Privilege Level B to A do not require the Bureau of Classification's approval.

However, a Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636) must be completed, approved at the institution and entered into the DOTS system when a privilege level changes.

The privilege level review process—not to be confused with a Supervision Review—weighs both known behavior and future risk levels. The information reviewed during the assessment will include, but is not limited to:

- Program Involvement
- Current privilege level
- Time served in current privilege level
- Total time spent in level 5 and/or level 4
- Time left to spend on current sentence
- Time since last incident that resulted in inmate being designated level 5 or 4
- Conduct Reports
- Reason for placement
- Behavior in the last five years—Prior to Level 4 or 5 classification
- Security level when placed

- Adjustment/behavior after placement
- Interaction with others (staff and/or inmates)
- The offender recognizes and acknowledges factors contributing to the commission of the placement offense and nature
- Other Factors which indicate a risk of future violence

The committee will use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. The privilege level review will be in a narrative form to record the factors considered by the evaluating employee. The inmate will appear before the Privilege Level Review Committee to ensure that he has the opportunity to have input into the process and respond to questions the committee may have during the review. The Privilege Level Review Committee will consist of a Unit staff member, a Custody staff member, and a Warden's designee. They may consult with any other staff person (Mental Health, Medical, Executive Staff, etc.) during the course of the review process.

**G. Privilege Level Review for Level 4**

Inmates placed in level 4 shall receive privilege level reviews during the time between annual supervision reviews. The annual supervision review procedures are more fully described below. The provisions of this section pertain only to privilege levels within the assigned security level.

Privilege level 4B is an entry level privilege status. Placement in 4B is for an indeterminate period. Inmates classified into Level 4B shall have an assessment



completed every six months. Inmates who are in privilege level 4B and have been reviewed pursuant to this subsection may be placed in privilege level 4A.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express his objections and explain his current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his eligibility for reduction. The first assessment will take place six months after the initial placement, and will continue every six months thereafter.

The Privilege Level Review Committee will make a recommendation to the Warden/Designee to either continue the inmate in 4B or reduce him to 4A, supported by a written rationale. The Warden/Designee shall then render a decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.

**H. Privilege Level Review for Level 5**

Inmates placed in level 5 shall receive level reviews during the time between annual supervision reviews. The annual supervision procedures are more fully described below. The provisions of this section pertain only to privilege levels within the assigned security level. Inmates classified into Level 5B shall have an

assessment completed every three months; inmates classified as Level 5A shall have an assessment completed every six months.

Placement in Level 5 is for an indeterminate period. Privilege level 5B is an entry level privilege status. Inmates who are in privilege level 5B and have been reviewed pursuant to this subsection may be placed in privilege level 5A.

The Privilege Level Review Committee will consist of three members, designated by the Warden/Designee, such as the inmate's Unit Manager, Case Manager (to comment on educational programming, and other programming), Mental Health staff, and/or a custody staff person.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express his objections and explain his current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his eligibility for reduction. The first review for 5A inmates will take place six months after the initial placement, and will continue every six months thereafter. The first review for 5B inmates will take place three months after the initial placement, and will continue every three months thereafter.

At the annual (one-year) review a Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636) will be completed — regardless of the recommendation — affording the inmate the normal classification review and appeals process.



The Review Committee will make a recommendation to the Warden/Designee to either continue the inmate in 5B, or to reduce him to 5A, supported by a written rationale. The Warden/Designee shall then render a final decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.

**I. Annual Supervision Review:**

All Level 4 and Level 5 inmates will have supervision reviews completed at least annually. The classification Committee shall consist of three members, which may include the Deputy Warden of Operations/Designee, the Unit Management Administrator, a Unit Manager, a Case Manager and/or other Unit Staff member and may include a Mental Health staff. All annual reviews must include a Director's designee to review all pertinent information and make a recommendation.

The inmate is to be served with a Notice of Hearing 48 hours prior to the hearing, and afforded the opportunity to appear before the entire committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 4 or 5 placement. The inmate will be afforded the opportunity to submit a written statement to the committee. The committee shall make a comprehensive review of the inmate's institutional

adjustment and behavior, including his behavior since placement in level 5 in order to make an assessment of the risk to safety and security posed by such an inmate.

This committee shall review the completed Privilege/ Security Level Review, Level 5B, 5A & 4B Form (DRC2634, DRC2636), and will take into consideration at a minimum the following information:

- Reason for placement in Level 4 or 5 and relevant circumstances;
- Conduct Reports;
- Current privilege level;
- Time served in current privilege level;
- Total time spent in level 5 and/or level 4;
- Time left to spend on current sentence;
- Time since last incident that resulted in inmate being designated level 5 or 4;
- Program Involvement;
- Behavior in the last five years, including prior to Level 4 or 5 classification;
- Security level prior to placement;
- Adjustment/behavior after placement;
- Factors which indicate a risk of future violence;
- Interaction with others (staff and/or inmates);
- Recognition and acknowledgment of the factors contributing to the commission of the placement offense and nature;
- The findings and recommendations of the previous assessment committees;
- Previous review committees;
- The findings and recommendations of all assessment committees subsequent to the placement in level 4 or level 5;
- The findings and recommendations of all supervision review committees subsequent to placement in level 4



or level 5;

The committee will use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. The classification committee shall review the completed Privilege / Security Level Review, Level 5B, 5A & 4B Form and any other relevant information. The committee shall review and evaluate the factors listed above, the circumstances underlying the placement in Level 4 or 5, the reasons for initial placement, the inmate's subsequent actions and his demonstrated attitude. The committee shall determine whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security, within their professional correctional judgment. The committee shall make a recommendation to reduce or continue the inmate's security level accordingly. The committee shall identify the basis for its decision and the factors relied upon. If the committee believes the inmate presents a threat to security of a general population institution, the committee shall document their conclusions as to the inmate's risk and their reasons.

The classification committee shall forward its recommendation to the Warden/Designee. The Warden/Designee shall review the Privilege / Security Level Review, Level 5B, 5A & 4B Form and all other information presented, and approve or disapprove the recommendation. If the warden approves the recommendation, he or she shall submit the recommendation and the approval to the Bureau of Classification for final disposition. The inmate shall be notified of the warden's approval of the recommendation and may file a formal objection to the

recommendations of the classification committee and warden with the Bureau of Classification within fifteen days of the date he is served with the committee's recommendation and warden's action.

The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a decision.

Security Designation Long Form: Form Nos. DRC2568, DRC2630, DRC2569
Supervision Review Forms: DRC2098, DRC2094, DRC2629, DRC2338
Notice of Hearing Form: DRC2598
Information Presented by the Inmate: DRC2627
Information Presented by Staff: DRC2628).
Classification Committee Report Level 5 Placement, DRC2637, DRC2638, DRC2639
Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636)

**RECOMMENDED PRIVILEGE LEVELS FOR LEVELS 5 AND 4:**

| | Level 5B | Level 5A | Level 4B | Level 4A |
|---|---|---|---|---|
| Clothing | 3 State Issue Uniforms | 3 State Issue Uniforms | 3 State Issue Uniforms | 3 State Issue Uniforms |
| Privilege Level Review | 3 Months | 6 Months | 6 Months | N/A |
| Classification Status Review | Annually | Annually | Annually | Annually |
| Phone Calls | One ten minute call per month. All others only by request of Attorney of Record or confirmed serious illness or death in the family | Two ten minute calls per month. All others only by Request of Attorney of Record or confirmed serious illness or death in the family. (Warden's Discretion) | One ten minute call per week. All others only by request of Attorney of Record or confirmed serious illness or death in the family (Warden's Discretion) | 2 times per day |

| | | | | |
|---|---|---|---|---|
| | (Warden's Discretion) | | | |
| Recreation | 5 one-hour periods per week, inside or outside recreation areas. | 5 one-hour periods per week; inside or outside recreation areas. Congregate recreation opportunity with at least one other inmate. | 5 one-hour periods per week; inside or outside recreation pods. Congregate recreation with at least one other inmate. | Seven 1- ½ hour periods per week |
| Shaving | 3 times per week | 3 times per week | 5 times per week | Any-time during the day. |
| Shower | 5 times per week | 5 times per week | 5 times per week | Twice per day. |
| TV | State Issued or purchase from commissary. Programming only. | State Issued or purchase from commissary Programming and Network. | Network and Institutional programming provided on range TV. Movie rentals on weekends and holidays. | May have personal TV |

| | | | | |
|---|---|---|---|---|
| Walkman | None | Walkman w/ AM/FM w/cassette player. No cassettes permitted. Battery operated. | Walkman/Cassette AM/ FM w/cassette player. Battery operated. Five (5) cassettes permitted. | Commissary Purchase or Approved vendor |
| Visits | Non-Contact, 2 visits per month, per visitor for up to 2.5 hours; Attorney of Record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 3.5 hours, Attorney of Record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 4 hours, Attorney of Record, Clergy of Record. | Contact, 2 visits per month per visitor for up to 7 hours. |
| Library/ Legal Service | Library: 3 paper-back books Legal: Per kite to Paralegal. | Library: 4 paperback books Legal: Per kite to Paralegal. | Library: 5 paperback books Legal: Per kite to paralegal. | Minimum 4 1/2 hours per week. |
| Program-ming | Broadcast over TVs provided in each cell Small group program-ming in program booths | Broadcast over TVs provided in each cell Small group programming in program booths | Broadcast over TVs provided on range. Small group counseling, no more than four inmates. | Broadcast over TVs; Small group counseling. |

| | | | | |
|---|---|---|---|---|
| Commissary Spending Limit Twice Per Month | $30.00 | $50.00 | $70.00 | $100. |

(Petitioner's Note: forms associated with this policy were omitted; see R., Def. Ex. C.)

(3)

No. 04-495

Supreme Court, U.S.
FILED
NOV 12 2004
OFFICE OF THE CLERK

# In The Supreme Court of the United States

REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## COUNTER STATEMENT OF QUESTION PRESENTED

When it is established that confinement at a super-maximum security prison imposes an "atypical and significant hardship" on those imprisoned there, thus giving rise to a constitutionally-protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995), is it appropriate in determining what process is due to weigh private and public interests and the risk of error pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTER STATEMENT OF QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| REASONS FOR DENYING THE WRIT | 1 |
| I. PETITIONERS INCLUDE IN THE APPENDIX THE WRONG VERSION OF THE PROCEDURAL REQUIREMENTS AT ISSUE, AND MISSTATE CRUCIAL FACTS FOUND BY THE COURTS BELOW | 1 |
| II. PETITIONERS MISREPRESENT THE ANALYSIS AND HOLDING OF THE COURT OF APPEALS | 5 |
| III. THE RELIANCE OF THE COURTS BELOW ON *MATHEWS V. ELDRIDGE* IS CONSISTENT WITH THE DECISION OF THIS COURT IN *HEWITT V. HELMS* | 7 |
| IV. NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL EXISTS ON THE ISSUE DECIDED BY THE COURT OF APPEALS | 9 |
| V. THE COURTS BELOW REASONABLY BALANCED THE COMPETING INTERESTS SET FORTH IN *MATHEWS V. ELDRIDGE* BASED ON THE EXTENSIVE FACTUAL RECORD AT TRIAL | 12 |
| CONCLUSION | 16 |




## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) | *passim* |
| *Austin v. Wilkinson*, 189 F. Supp.2d 719 (N.D. Ohio 2002), *aff'd in part and rev'd in part*, 372 F.3d 346 (6th Cir. 2004) | 6 |
| *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997) | 10 |
| *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985) | 10 |
| *Crosby-Bey v. District of Columbia*, 786 F.2d 1182 (D.C. Cir. 1986) | 10 |
| *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999) | 10 |
| *Hewitt v. Helms*, 459 U.S. 460 (1983) | *passim* |
| *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) | 11 |
| *Mathews v. Eldridge*, 424 U.S. 319 (1976) | *passim* |
| *Mims v. Shapp*, 744 F.2d 946 (3rd Cir. 1984) | 11 |
| *Sandin v. Conner*, 515 U.S. 472 (1995) | *passim* |
| *Shoats v. Horn*, 213 F.3d 140 (3rd Cir. 2000) | 11 |
| *Vitek v. Jones*, 445 U.S. 480 (1980) | 13 |
| *Wolff v. McDonnell*, 418 U.S. 539 (1974) | *passim* |

## REASONS FOR DENYING THE WRIT

### I. PETITIONERS INCLUDE IN THE APPENDIX THE WRONG VERSION OF THE PROCEDURAL REQUIREMENTS AT ISSUE, AND MISSTATE CRUCIAL FACTS FOUND BY THE COURTS BELOW[1]

#### A. Petitioners Include In The Appendix The Wrong Version Of The Procedural Requirements At Issue

Petitioners state: "The procedure for classifying inmates as Level 5 is contained in ODRC Policy 111-07, issued January 3, 2002." Petition at 6. This is error. As explained by the Court of Appeals:

> [T]he case was scheduled for trial in January 2002. On the eve of trial, the ODRC released a new version of 111-07 ("new 111-07"), and it is the district court's ordered modifications to new 111-07, made after a bench trial, that are at issue on this appeal.

App. 5a.

Thus, the procedures at issue on this appeal are contained in Petitioners' Policy 111-07 as modified by the District Court after trial and post-trial briefing. But the version of ODRC Policy 111-07 which appears in the Appendix as Appendix E, App. 122a-144a, is the policy "Issued January 3, 2002," before trial, not the policy as modified by the District Court pursuant to its Orders of

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[1] See Supreme Court Rules 14.5 and 15.2.

March 26, 2002 (Appendix C) and May 15, 2002 (Appendix B).[2]

Nowhere in Petitioners' papers will this Court find the procedures it is being asked to assess.

### B. Petitioners Misstate Crucial Facts Found By The Courts Below

Petitioners' "Statement of the Case" contains misstatements as to both procedure and substance.

#### 1. Procedure

Petitioners' error in providing this Court with a set of procedures not on appeal, and omitting the procedures actually at issue, leads to a series of misstatements in Petitioners' Statement of the Case. Among these misstatements are the following:

The current procedure for classifying inmates as Level 5 is not "contained in ODRC Policy 111-07, issued January 3, 2002." Petition at 6.

The events alleged by Petitioners at 6 to "trigger" the placement of a prisoner in supermaximum security – a finding by a Rules Infraction Board or a conviction for a new crime committed while in prison – are nowhere

[2] The policy that appears on the internet at http://156.63.250.98 as 53-CLS-04 incorporates the modifications required by the District Court. 53-CLS-04 "supersedes: 111-07 dated 5/22/02" in the sense that it gives that policy a new number, but is substantively identical with Policy 111-07 dated May 22, 2002, not with Policy 111-07 dated January 3, 2002.



mentioned in cited section VI(C) of Policy 111-07, which is reproduced at App. 127a-130a.

Procedures for "Placement in Level 5," App. 127a-130a, do not include preparation of a written report that broadly reviews the inmate's characteristics and conduct, nor is "age" or "time remaining on sentence" listed among the placement criteria, as indicated in the Petition at 6-7.

In their Petition at 7-8, Petitioners cite "Security Designation (Long Form), App. 144a," "Notice of Hearing Form, App. 144a," "Classification Committee Report Form, App. 144a," and "Privilege/Security Level Review Form, App. 144a," but no such forms appear at App. 144a.[3]

The Petition states at 7 that the classification committee makes a recommendation to the Warden "that includes a narrative description of 'the nature of the threat the inmate presents and the committee's reasons for the recommendation.'" However, the quoted words nowhere appear in the cited pages of Policy 111-07 at App. 127[a]-130a.

In describing the process for evaluating whether a prisoner should be retained at the Ohio State Penitentiary, Petitioners state that the first factor considered is "the prisoner's underlying criminal offense." Petition at 7. In fact, this factor is not among the eighteen (18) factors listed in the version of Policy 111-07 contained in the Appendix at 138a-139a (nor in Policy 111-07 as modified by the District Court).

[3] See App. 144a: "(Petitioner's Note: forms associated with this policy were omitted; see R., Def. Ex. C.)"

### 2. Substance

In Section A of Petitioners' Statement of the Case, Petitioners conclude: "The usual stay at OSP [Ohio State Penitentiary] is at least a year." Petition at 5. This statement is misleading. What the District Court actually found as fact was:

> The vast majority of inmates placed at the OSP will remain for a minimum of two years, with only an annual review of their status. To date [February 2002], two hundred OSP prisoners have been there for more than three years.

App. 90a. The trial court also observed:

> Even with good behavior, inmates at OSP serve indefinite terms at the institution. With the exception of the end of their sentences, there is no other indication of how long an individual inmate will be kept at the institution.

App. 91a.

Section C of Petitioners' Statement of the Case, entitled "The proceedings below," and Petitioners' "Question Presented," are not based on what the Court of Appeals found.

Petitioners state that plaintiffs "claim" that "they have a liberty interest in staying out of supermax," Petition at 8. However, Petitioners do not appeal this holding of the courts below and must be understood no longer to contest it.

Petitioners state that a majority of the Court of Appeals held that "all deprivations significant enough to implicate a liberty interest under *Sandin v. Conner*, 515



U.S. 472 (1995) are serious enough to create a presumption that *Wolff*-type procedures are necessary." Petition at 10, citing App. 23a. There is no mention of *Wolff v. McDonnell*, 418 U.S. 539 (1974), on the cited page of the opinion of the court below.

In their Question Presented, Petitioners represent that this is a case in which "prison regulations create a liberty interest for the prisoner in avoiding [supermaximum security] placement." In fact, the Court of Appeals found that a liberty interest was created because placement at "OSP constitutes an atypical and significant hardship under *Sandin*." App. 14a. This error, ignoring the balancing of harm to the prisoner against the interests of the state, infuses Petitioners' whole approach.

Petitioners concede that all three members of the court of appeals panel called "for an independent vetting of Ohio's process under the formula set in *Mathews v. Eldridge*, 424 U.S. 319 (1976)." Petition at 10. Nevertheless, as Respondents show below, this does not prevent Petitioners from inaccurately alleging that the Court of Appeals opted for *Wolff* rather than *Hewitt v. Helms*, 459 U.S. 460 (1983). Respondents will proceed to demonstrate that what the Court of Appeals actually did was to reject a methodology of mechanically choosing between *Wolff* and *Hewitt* on the basis of the purported nature of the decision involved, instead advocating the interest-balancing methodology of *Mathews v. Eldridge*.

## II. PETITIONERS MISREPRESENT THE ANALYSIS AND HOLDING OF THE COURT OF APPEALS

Petitioners assert that the Court of Appeals followed the Ninth Circuit in requiring "*Wolff*-type proceedings,"

bringing the Sixth and Ninth Circuits into conflict with the Third, Eighth and D.C. Circuits. Petition at 8-10, 11-19, especially 17.

Petitioners misrepresent the analysis and holding of the court below.

First, it should be noted that in their petition to this Court, Petitioners no longer contest the finding of the District Court, affirmed by the Sixth Circuit, that confinement at the Ohio State Penitentiary imposes an atypical and significant hardship, and thereby gives rise to a constitutionally-protected liberty interest. See *Austin v. Wilkinson*, 189 F. Supp.2d 719, 737-742 (N.D. Ohio 2002), *aff'd in part and rev'd in part*, 372 F.3d 346, 353-355 (6th Cir. 2004); App. 9a-15a, 85a-90a. The sole concern of the Petition for Certiorari is: a liberty interest having been established, what process is due?

Second, in summarily assigning the court below to a putative group of circuit courts of appeal that follow *Wolff* rather than *Hewitt*, Petitioners disregard the plain statement of all members of the circuit court panel that what they termed the "*Hewitt / Wolff* dichotomy" is "not a viable form of analysis." App. 19a n.10. The burden of placement or retention for an indefinite period of years in a supermaximum security prison is far weightier than the burdens at issue in either *Wolff* or *Hewitt*. The court below insisted that the District Court correctly began its analysis by weighing the interests at stake pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than by focusing on whether a given decision was retrospective and disciplinary or prospective and administrative. App. 18a-24a.

The opinion below emphasized that Petitioners, both in their brief and at oral argument, identified as most



burdensome the procedure mandated by the District Court "requiring officials to limit their placement decision to only those matters detailed in the notice given to the inmate." App. 23a. The opinion went on to find this requirement appropriate in view of the fact that Petitioners' own policy limits the state's discretion in placing or retaining prisoners at the OSP by specifying "certain factual predicates, all of which are historical in nature." *Id.* Then, having found that the additional procedural requirement identified by the state as most burdensome "passes muster under *Mathews v. Eldridge*," the court below concluded that procedures imposing a lesser burden than notice are also appropriate. App. 24a.

In sum, what the court below did was to analyze the specific facts established at trial of this case pursuant to the three-part test set forth in *Mathews v. Eldridge*, and to hold that the procedural requirements mandated by the District Court were appropriate in light of this analysis. This is not following *Wolff* rather than *Hewitt*. As the Sixth Circuit explicitly stated, this is rejecting the *Wolff / Hewitt* dichotomy and instead assessing particular procedures required when the *Mathews* factors are applied to a specific set of facts.

## III. THE RELIANCE OF THE COURTS BELOW ON *MATHEWS V. ELDRIDGE* IS CONSISTENT WITH THE DECISION OF THIS COURT IN *HEWITT V. HELMS*

Petitioners claim that the use of the *Mathews* balancing test by the District Court and the Court of Appeals is inconsistent with this Court's decision in *Hewitt*. On the contrary, the Supreme Court in *Hewitt* also applied the *Mathews* balancing test. 459 U.S. at 473-474. What made

the result below different is that the factual record here is different than the factual record in *Hewitt*.

In contrast to the short-term administrative segregation experienced by the plaintiff prisoner in *Hewitt*, the class of plaintiff prisoners in *Austin* were placed in the supermax and denied the opportunity for either transfer or parole, not for weeks, but for an indefinite term of years. Moreover here, in contrast to *Hewitt*, the courts below relied on a record demonstrating a substantial risk of erroneous decision-making.

The courts below in this case applied the same balancing test used in *Hewitt* to a dramatically different set of facts. *Hewitt* itself began by noting that the "requirements imposed by the [Due Process] Clause are, of course, flexible and variable dependent upon the particular situation being examined." 459 U.S. at 472. Because the administrative segregation at issue in *Hewitt* was short-term (during investigation to determine whether there was probable cause that would lead to a disciplinary hearing), did not carry a stigma (of having engaged in serious misconduct), and would not have any significant effect on the prisoner's parole opportunities, the Court found that the prisoner's private interest in being free from administrative segregation was "not one of great consequence." *Id.* at 473, 476. Here the facts are dramatically different: the conditions of confinement impose an atypical and significant hardship, the segregation is long-term after a finding of serious misconduct, and parole is irrebuttably prohibited for as long as the prisoner is incarcerated at the Ohio State Penitentiary. Because of the factual differences between the Ohio State Penitentiary case and the unusual circumstances affecting the individual in *Hewitt*, the District



Court and the Court of Appeals reached a different conclusion here.

## IV. NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL EXISTS ON THE ISSUE DECIDED BY THE COURT OF APPEALS

Petitioners claim that the Third, Eighth and D.C. circuits have decided, contrary to the Ninth and Sixth circuits, that *Sandin*'s new framework for analysis leaves unaffected the concept that the minimal due process protections set forth in *Hewitt* are sufficient for all administrative placement decisions.

We have shown above that this argument misrepresents what the courts below held in the present case (*supra*, II), and what this Court held in *Hewitt* (*supra*, III). Petitioners have also misstated the positions of other circuit courts of appeal.

The Sixth Circuit Court of Appeals in this case addressed the question whether

> *Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic way in which they applied the *Hewitt/Wolff* dichotomy. After *Sandin*, both steps of the analysis – the creation of a liberty interest and the determination of the process due to protect that interest – must carefully reference the severity of the deprivation at stake.

App. 18a.[4]

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[4] The Court in *Sandin* abandoned "*Hewitt*'s methodology" without overruling the holding in *Hewitt*. "Our decision [in *Sandin*] only

(Continued on following page)

Even a cursory reading of the cases cited by Petitioners show that most were decided prior to *Sandin*. There was no way such a case could evaluate the impact of a case not yet decided.

For example, *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985), cited by Petitioners, was decided almost a decade before this Court decided *Sandin*. To demonstrate that a conflict exists among the circuits after *Sandin*, Petitioners have to show that the Eighth Circuit still maintains its position in *Clark*. They cite no authority in support of that proposition.

So too, of the two D.C. Circuit cases cited by Petitioners, one, *Crosby-Bey v. District of Columbia*, 786 F.2d 1182 (D.C. Cir. 1986), predates *Sandin* and therefore could not have addressed the issue that *Sandin* decided. The other, *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), was a post-*Sandin* case in which the court never determined whether the prisoner there had a liberty interest and therefore never had to face the issue of whether the determination that an atypical and significant hardship exists affects the determination of the amount of process due. The *Brown* court noted: "If Brown had shown that the Housing Board's finding that he had assaulted a guard was treated for parole or other purposes as equivalent to a disciplinary finding to this effect, . . . this might indicate that more extensive procedural protections were warranted." *Id.*, 131 F.3d at 171 n.8. And in another administrative segregation case two years after *Brown*, *Hatch v. District of Columbia*,

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abandons an approach that in practice is difficult to administer and which produces anomalous results." 515 U.S. at 483 n.5.



184 F.3d 846 (D.C. Cir. 1999), the Circuit expressly recognized that it had not decided whether *Hewitt* or *Wolff* protections apply once a liberty interest is held to exist, stating that it "need not decide the applicability of *Wolff*" because the prisoner plaintiff had not received the process due under *Hewitt*. *Id.*, 184 F.3d at 852.

Similarly, the Third Circuit's decision in *Mims v. Shapp*, 744 F.2d 946 (3rd Cir. 1984), was pre-*Sandin*, and its post-*Sandin* decision in *Shoats v. Horn*, 213 F.3d 140 (3rd Cir. 2000), never squarely faced the question raised here of whether *Sandin* "called into question . . . the mechanistic fashion in which [the circuit courts] applied the *Hewitt/Wolff* dichotomy." App., 18a. The Third Circuit found that a post-*Sandin* liberty interest existed and then applied the *Hewitt* procedural analysis. But Shoats apparently never argued that *Hewitt* procedures were inadequate. Rather, he contended that his continued long-term confinement in administrative segregation was based solely on his past criminal history and on the purported bias of the decision-maker, arguments the Circuit rejected. *Id.*, 213 F.3d at 146. The Third Circuit nowhere discussed the question that the Sixth Circuit decided, namely, whether *Sandin* requires changing the mechanistic application of the *Hewitt/Wolff* dichotomy as to what process is due.

The only other circuit to address the issue with which the Sixth Circuit grappled here is *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). It did so in cursory fashion, simply noting the statement in *Sandin* that "the time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *MeacAum*." *Id.* at 1089, quoting *Sandin*, 515 U.S. at 483.

There is a reason for the paucity of circuit court decisions on the issue decided by the circuit court in this case: *Sandin*'s focus on the severity of the deprivation has dramatically reduced the number of cases in which prisoners have established a liberty interest. *Sandin* emphasized the severity of deprivation because this Court was concerned to avoid cases based on state regulations where prisoners claimed a liberty interest in "receiving a tray lunch rather than a sack lunch" or "receiving a paperback dictionary." 515 U.S. at 483.

The decision below appears to be the first to have found a liberty interest for all prisoners confined in a supermaximum security prison and, as is conceded by Petitioners, such confinement imposes an atypical and significant hardship giving rise to a constitutionally-protected liberty interest for all imprisoned there. "Any liberty interest which passes *Sandin*'s threshold," the Sixth Circuit concluded, "comes with a higher presumption of process due than those which may have been found pre-*Sandin*." App. 22a n.12.

No circuit court of appeals other than the Sixth Circuit has thus far clearly addressed the question presented here. This Court need not do so now.

## V. THE COURTS BELOW REASONABLY BALANCED THE COMPETING INTERESTS SET FORTH IN *MATHEWS V. ELDRIDGE* BASED ON THE EXTENSIVE FACTUAL RECORD AT TRIAL

The Court of Appeals reasonably balanced the three factors outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), based on an extensive and detailed trial record.



The balancing test articulated in *Mathews* has three components: the private interest, the risk of erroneous deprivation of such interest, and the Government's interest.[5]

The first element is "the private interest that will be affected by the official action." 424 U.S. at 335; App. 19a. The Court of Appeals considered that

> placement at OSP is indefinite and reviewed only annually. . . . Prisoners placed at OSP are deprived of all significant human contact and have other restrictions placed upon their movement and their personal privileges; they are also ineligible for parole during their stay at OSP.

App. 21a; see also the Court of Appeals' summary of the District Court's findings at 10a. As to this first of the

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[5] *Wolff* preceded and foreshadowed the *Mathews v. Eldridge* balancing test which the Sixth Circuit followed. According to *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974):

> We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v McElroy, 367 US at 895, 6 L Ed 2d 1230. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Ibid.; Morrissey, 408 US, at 481, 33 L Ed 2d 484, 92 S Ct 2593.

And, at 567, *Wolff* states, "Rules of procedure may be shaped by consideration of the risks of error, [citations omitted], and should also be shaped by the consequences which will follow their adoption." While not referring to *Mathews*, the Supreme Court in *Vitek v. Jones*, 445 U.S. 480 (1980) found that the District Court had properly identified and weighed the relevant factors: the interest of the State, the interest of the prisoner, and the risk of error.

*Mathews* factors, the Court of Appeals found the private interest at stake in this case "significant." App. 21a.

The second *Mathews* factor is "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335; App. 19a. Here the Court of Appeals found that "the district court made specific findings concerning past erroneous and haphazard placements at OSP, which go unchallenged on appeal." App. 22a. "[I]n the face of the substantial factual findings of the district court as to haphazard ODRC placements," the Court of Appeals determined, "the procedural requirement of notice is particularly important"; accordingly it gave "great weight to its [the notice requirement's] value in increasing accuracy." App. 19a-20a n.11.

The final *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335; App. 19a. Regarding this final component of the test, the court below emphasized that Petitioners were seeking to have it both ways:

> Having set out a detailed and restricted list of reasons why inmates can be put at OSP, the ODRC cannot turn around and argue that the district court's order decreases their ability to rely on "rumor, reputation, and even more imponderable factors," for those factors are illegitimate under their own placement scheme.

App. 23a. The Court of Appeals reasonably concluded "that many of the procedures ordered by the district court are



an attempt to reconcile an elaborate administrative appeals scheme created by the ODRC Officials with the requirement that the inmate know the reason for any decision made about his fate. . . . " App. 24a.

The Court of Appeals recognized that the type of decision being made will be a "factor" in a court's decisions. App. 19a-20a n.11. But, as explained by the Court of Appeals below, at App. 18a-19a,

> It is not enough to say that a particular decision is "forward-looking"; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance.

Nothing in the decisions of the courts below require this Court's intervention.

## CONCLUSION

For the above-stated reasons, Respondents urge this honorable Court to deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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**In The Supreme Court Of The United States**

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REGINALD WILKINSON, et al.,
*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,
*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# REPLY BRIEF FOR THE PETITIONER

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## TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

A. The decision below conflicts with the Court's decisions because it rejects *Hewitt's* application of *Mathews* and because it misreads *Sandin* to do so ..... 2

B. The circuits are split over whether *Hewitt* controls predictive decisions such as the ones here, and that includes a split over whether *Sandin* changed *Hewitt* ..... 6

C. Petitioners cited the right policy ..... 10

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Brown v. Plaut*,
131 F.3d 163 (D.C. Cir. 1997) .....7, 8

*Hatch v. District of Columbia*,
184 F.3d 846 (D.C. Cir. 1999) .....7, 8, 9

*Hewitt v. Helms*,
459 U.S. 460 (1983) .....*passim*

*Keenan v. Hall*,
83 F.3d 1083 (9th Cir. 1996).....7

*Mathews v. Eldridge*,
424 U.S. 319 (1976) .....*passim*

*Sandin v. Conner*,
515 U.S. 472 (1995) .....*passim*

*Shoats v. Horn*,
213 F.3d 140 (3d Cir. 2000).....7, 9

*Wolff v. McDonnell*,
418 U.S. 539 (1974), .....*passim*

## INTRODUCTION

Respondents' brief in opposition ("Opp.") confirms, rather than negates, the need for review here. For, just as the Sixth Circuit did below, Respondents here fundamentally misunderstand this Court's decisions in *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin v. Conner*, 515 U.S. 472 (1995). That misunderstanding led the panel astray, and it explains why Respondents do not see the conflict between the Sixth Circuit's decision and this Court's precedents, and why they fail to grasp the nature of the circuit split as well.

*Hewitt's* fundamental teaching was not just its holding that prisons need not establish formal, trial-type procedures to make predictive decisions about placing prisoners in higher-security settings for preventive reasons. Though this resulting holding was important, what was equally important was the principle that led to it. *Hewitt* reached this result by applying the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to this prison-placement context in a categorical way. *Hewitt* taught that no matter how the high the government's interest and the prisoner's interest in the outcome, the deciding factor would always be the third *Hewitt/Mathews* factor, regarding the cost or benefit of additional process.[1] That third factor always weighed against requiring more process—such as the formalized process required by *Wolff v. McDonnell*, 418 U.S. 539 (1974) for retrospective disciplinary proceedings—because extra process does not aid the quality of a highly subjective, predictive decision. Thus, as detailed below, the idea that the Sixth Circuit was getting back to *Mathews* when it rejected *Hewitt* (Opp. at 7) makes no sense, as *Hewitt* already provides a controlling, prison-specific version of *Mathews*, and the Sixth Circuit's contrary reading needs correction.

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[1] The added-value factor was the second factor in *Mathews*, but it was the third in *Hewitt*, so we label it as the third here.

And *Sandin*, quite simply, said nothing about any of this. It dealt only with the baseline question of *whether* a liberty interest exists, and it does not tell us what process is due once an interest exists. The panel's reliance on *Sandin*, then, for the what-process-is-due question, reflects yet another aspect of the conflict with this Court's precedent. This approach also reflects another angle to the circuit split, as some circuits have similarly adopted the errant view that *Sandin* changed the law regarding the process due, while other circuits have properly stayed the course in recognizing that *Hewitt* still controls the question of what-process-is-due when predictive prison-placement decisions are at issue.

Thus, the conflicts are real, and they require review. And as also explained below, Respondents are wrong in arguing that Petitioners discussed the "wrong version" of the prison policy at issue. Opp. at 1–2. The petition should be granted.

**A. The decision below conflicts with the Court's decisions because it rejects *Hewitt's* application of *Mathews* and because it misreads *Sandin* to do so.**

Respondents mistakenly assert that the decision below did not reject *Hewitt* in favor of *Wolff*, but that the Sixth Circuit merely rejected a "*Wolff/Hewitt* dichotomy," and that the Sixth Circuit merely applied *Mathews* "to a specific set of facts." Opp. at 7. Respondents are wrong, as the Sixth Circuit got it wrong on the law, not the facts, in several ways, and in doing so, it conflicted with this Court's decisions.

**First,** Respondents and the Sixth Circuit alike fail to appreciate that *Hewitt* established a general principle that the third *Mathews* factor controls in predictive prison-placement cases. To be sure, the Court in *Hewitt* did examine the first two *Mathews* factors, and it did note that the State's interest in maintaining prison safety is high, and that the prisoner's



interest is lower, given that he is already imprisoned and merely challenges his security level or conditions. *Hewitt*, 459 U.S. at 473–74. But the third *Mathews* factor, which looks to the value of additional procedural safeguards, was plainly dispositive in *Hewitt*. That is not surprising in any *Mathews* application, since after all, the ultimate question is "what process is due," so it makes sense to focus on whether extra process adds any value.

*Hewitt* explained that extra procedural safeguards would not add value because of the *nature* of the decision at issue: because placement decisions are predictive and subjective, they are "singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9. *Hewitt* specifically contrasted such predictive decisions with the retrospective factfinding that is aided by trial-type proceedings, such as in *Wolff*. *Id.* at 473–74.

Notably, this logic holds true as a categorical matter for *all* such predictive decisions, regardless of any changes in applying the other two *Mathews* factors. So any attempt to distinguish this case from *Hewitt* based on facts concerning the other *Mathews* factors—such as the claim that the placement here is more onerous than that at issue in *Hewitt*—must fail, because *Hewitt's* overriding demand is that extra process should not be required when it adds no value.

Indeed, the Sixth Circuit's decision is notable in this regard, as its purported "*Mathews* analysis" nowhere asserts that the extra process ordered would add anything. Instead, the Sixth Circuit said only, regarding the third factor, that the extra process would not burden Ohio too greatly. App. at 23a. The court mostly focused on the other factors, finding—contrary to *Hewitt's* command—that the nature of the decision did not matter as much, and that the primary factor was the weight of the prisoner's interest in avoiding

supermax placement. *Id.* at 21a–24a. Thus, the Sixth Circuit conflicted with *Hewitt*, and it did so in a categorical way, not a factbound way. That warrants review.

**Second,** the Sixth Circuit's rejection of *Hewitt* was based solely on its mistaken reading of *Sandin*, and that means that the decision below conflicts with *Sandin* as well. Notably, while the Sixth Circuit ultimately criticized and rejected what it considered a false "*Hewitt/Wolff* dichotomy," it essentially acknowledged that, even in its view, there *was* such a dichotomy pre-*Sandin*, and that it was established by this Court and was properly followed by courts below. App. at 18a–19a. As the Sixth Circuit explained it, cases fit neatly into one side or the other, *Hewitt* or *Wolff*:

> Before *Sandin*, state-created liberty interests of prisoners were either protected by an adversary hearing on the record following *Wolff* ... or a more free-form hearing following *Hewitt*.... Cases following the *Hewitt/Wolff* split have classified various factual situations depending upon the category into which the challenged process fell: disciplinary or administrative, historical or prospective, objective or subjective, *Wolff* or *Hewitt*.

App. at 18a (citations omitted). Thus, in the Sixth Circuit's view, the only question was whether *Sandin* somehow changed the *Hewitt/Wolff* framework.

On that question, the Sixth Circuit left no doubt that it thinks that *Sandin* changed everything. It first described the question as unclear: "What is much less clear after *Sandin* is how to determine what process is due to protect that interest." App. at 18a. It then concluded that *Sandin* raises the bar from *Hewitt* regarding what process is due: "We are convinced, however, that *Sandin* called into question not



only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic fashion in which they applied the *Hewitt/Wolff* dichotomy." *Id.* The court also said that *Sandin* shifted the focus from *Mathews'* third factor, regarding the value of extra process, to the first factor, regarding the inmate's interests: "After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake." *Id.*

Respondents adopt the Sixth Circuit's view that *Sandin* changed everything, and that is why, in their view, the decision below does not conflict with *Hewitt*; *Sandin*, they say, changed *Hewitt*. Petitioner Ohio, by contrast, believes that *Sandin* addressed *only* the question of when a liberty interest is created, and did not change the what-process-is-due inquiry. Thus, in our view, the court below not only conflicted with *Hewitt*, but by basing its abandonment of *Hewitt* upon a purported reading of *Sandin*, the panel conflicted with *Sandin*, too.

But more important, whether we or Respondents are right or wrong about whether *Sandin* changed *Hewitt* regarding what process is due, it seems hard to deny that our debate is a legal one about the meaning of those cases, not a factual one. Our dispute does not turn on how "harsh" conditions allegedly in Ohio's Supermax prison; our dispute turns on whether *Hewitt's* analysis survives *Sandin*. And as explained in Part B below, other circuits disagree about this same question, further amplifying the need for review.

**Third,** the Sixth Circuit not only abandoned *Hewitt*, but it plainly (and improperly) swung to the opposite pole of *Wolff*, and Respondents do not succeed in their attempt to minimize the importance of this holding. To be sure, the Sixth Circuit itself said that it was not "adopting" *Wolff*, as it

said that it was rejecting the "*Hewitt/Wolff* dichotomy," and that language suggests that in the court's view, its return to *Mathews* transcended *Wolff* as well as *Hewitt*. *Id.* at 18a–19a. So Respondents understandably parrot the court's language in disclaiming any adoption of *Wolff*. Opp. at 7.

But if we look past the labels attached (or detached) by Respondents or the Sixth Circuit, the plain mechanics of what the court *did* here show that it adopted *Wolff*-type procedures—and then some—in a case that belongs under *Hewitt*. The court acknowledged that the procedure that the district court imposed on Ohio here "closely tracks *Wolff*." App. 20a. Thus, by affirming the imposition of those procedures, the court imposed *Wolff*-type procedures in a case that does not call for them. The mere fact that the court disclaimed it was adopting *Wolff* does not change that fact.

**B. The circuits are split over whether *Hewitt* controls predictive decisions such as the ones here, and that includes a split over whether *Sandin* changed *Hewitt*.**

Just as the *Sandin* question underlies the panel's conflict with this Court's decisions, so, too, does that question underlie the circuit split. Properly understood, this further shows the need for review, and it shows why Respondents' attempt to explain away the split is unsuccessful.

First, Respondents are wrong when they wipe away all of the pre-*Sandin* cases simply on the basis that they were pre-*Sandin*. That "distinction," of course, works only if one first accepts that *Sandin* changed things on the what-process-is-due question. If, as we believe, *Sandin* did no such thing, then the conflict fairly includes all of the pre-*Sandin* cases.

Second, even looking at only post-*Sandin* cases, the split is real. On the Sixth Circuit's side of the split, the Ninth Circuit found, as the Sixth Circuit did, that *Sandin* changed



things, thus requiring *Wolff*-type proceedings rather than *Hewitt* process in a predictive-type case. *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). Respondents say only that *Keenan* analyzed *Sandin* in a "cursory fashion." Opp. at 11. The *Keenan* court, however, spent nearly two pages analyzing *Sandin*, and it dutifully followed what it (mistakenly) believed was this Court's precedent, which it thought now required *Wolff* procedures. 83 F.3d at 1088–89. The court properly explained how *Sandin* changed the liberty-interest question, but then it leapt to the conclusion that *if* a liberty interest existed, *then* the prisoner there *would be entitled to* "all of the process he was due under *Wolff*," and for support, the court cited *Sandin*'s statement that it was returning to the due process principles of *Wolff*. *Id.* at 1089. So it plainly—albeit mistakenly—adopted the view that *Sandin*'s "return to *Wolff*" applies to the what-process-is-due question along with the liberty-interest question. Thus, the Sixth Circuit is not alone in reading *Sandin* to have the effect of supplanting *Hewitt* and requiring *Wolff*, even for predictive decisions.

More important, on the other side of the split, both the D.C. and Third Circuits have continued to apply *Hewitt* to predictive-type cases, without changing that approach in light of *Sandin*. See *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997); *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999); *Sheats v. Horn*, 213 F.3d 140 (3d Cir. 2000).

In *Brown*, the D.C. Circuit plainly applied the "*Hewitt-Wolff* dichotomy" that the Sixth Circuit rejected; though it did not use the word "dichotomy," it contrasted *Hewitt* and *Wolff* proceedings in precisely the way that the Sixth Circuit said was no longer appropriate after *Sandin*. *Brown*, 131 F.3d at 170–71. The D.C. Circuit explained that *Hewitt* applied and required only "limited procedural safeguards" to placement decisions, such as the administrative segregation at issue in *Brown*, and it further explained that *Wolff* applied

only where retrospectively-focused disciplinary proceedings were at issue. *Id.* The D.C. Circuit did, as Respondent notes, decline to decide whether a liberty interest existed at all, but that was precisely because the court found it easier to determine that only *Hewitt* process was required, as that could have disposed of the prisoner's claims if the facts on remand showed that he received *Hewitt*-compliant (not *Wolff*-type) procedures. *Id.* at 170, 172.

Respondents also cite, curiously, a footnote in *Brown* in which the D.C. Circuit noted that *if* the prisoner had shown that the process at issue was disciplinary, as opposed to involving a predictive-placement issue, then "more extensive procedural protections" would be required. Opp. at 10 (citing *Brown*, 131 F.3d at 171 n.8). That citation is curious because the footnote confirms, rather than negates, the circuit split, as it shows how firmly the D.C. Circuit holds to the "*Hewitt*/*Wolff* dichotomy" that Respondents and the Sixth Circuit wish to inter. That is, the D.C. Circuit said that *if* the process were disciplinary and retrospective, it would trigger *Wolff*; otherwise, *Hewitt* controls. Compare App. at 18a ("Cases following the *Hewitt*/*Wolff* split have classified various factual situations depending upon the category into which the challenged process fell: disciplinary or administrative, historical or prospective....").

Similarly, the additional D.C. Circuit case that Respondents cite, *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), further confirms that the D.C. Circuit sticks to the "*Hewitt*/*Wolff* dichotomy." The prisoner in *Hatch* advanced two independent due-process claims: one against his placement in "administrative segregation," and one against his *separate placement* in "adjustment segregation," a disciplinary placement that was "unlike administrative segregation, punishes individuals for specific, proven acts of misconduct." *Id.* at 848. In analyzing the administrative segregation claim—i.e., the claim relevant



here—the court explained that it was undisputed that if the prisoner "had a liberty interest in avoiding administrative segregation, then *Hewitt* specifies the minimum procedures for placing him in such confinement." *Id.* at 851–52.

Separately, the *Hewitt* court analyzed the independent claim regarding the *disciplinary* segregation, and it is that part of the opinion that Respondents cite. Opp. at 11. To the extent that the D.C. Circuit left open the possibility that more extensive *Wolff*-type procedures might be required for prisoner Hatch's *disciplinary claim*, which was tied to past events, that again merely confirms the D.C. Circuit's continued commitment, post-*Sandin*, to the "*Hewitt*/*Wolff* dichotomy."

Finally, Respondents' attempt to explain away *Shoats*, in which the Third Circuit also continued to follow *Hewitt* post-*Sandin*, is also unsuccessful. Respondents argue that the inmate in *Shoats* "apparently never argued that *Hewitt* procedures were inadequate" and only "contended that his continued long-term confinement in administrative segregation was based solely on his past criminal history." Opp. at 11. But the Third Circuit recognized that "Shoats claims [he was kept] in administrative custody in violation of his Fourteenth Amendment right to *procedural* due process," 213 F.3d at 140, and "reject[ed] Shoats' argument that he has been deprived of the *process* he is due under the Fourteenth Amendment," *id.* at 144. Thus, the court did address the what-process-is-due issue. And the court recognized as a matter of course that *Hewitt* governed that question. The court noted that future predictions alone, even if based on past events, could justify the placement at issue, so *Hewitt* process was enough. *Id.* at 146. And by not addressing *Sandin* in the what-process-is-due part of its opinion, after discussing it extensively in the liberty-interest part, the court recognized that *Sandin* had no effect on any question regarding whether *Hewitt* or *Wolff* process is required.

### C. Petitioners cited the right policy.

Respondents insist that Ohio attached the wrong version of the policy at issue, and that we are fighting over the wrong one, but it is Respondents who are mistaken. The version at issue is the one that Ohio adopted in January 2002, which is in the Petition Appendix. As Respondents properly note, Ohio issued this policy after the case began, but before trial, and the trial focused on this one. Opp. at 1. Respondents do not now argue that the earlier pre-January 2002 policy is at issue. Instead, they mistakenly argue that the policy now at issue is the *modified policy that resulted from the post-trial imposition of the court-ordered changes to the policy*. Respondents have it wrong.

First, Respondents misread the Sixth Circuit's statement that "it is the district court's ordered modifications to new 111-07, made after a bench trial, that are at issue." *Id.*, quoting Pet. App. 5a. In stating that the district court's *modifications* were at issue, the Sixth Circuit meant that the issue was whether those modifications really were constitutionally required, or whether the policy was acceptable without those changes. Second, Respondents' new suggestion—that the Sixth Circuit reviewed the post-district-court policy to see if *that* was good enough—simply makes no sense. Obviously, we want to restore the policy that we had before the courts imposed more rules on us; we do not seek to attack (or need to defend) the court-rewritten version. We did not obtain a stay pending these appeals, so we have had to live under the new court-ordered rules, which required issuing yet another policy to implement those rules. But we want to restore our own rules.

## CONCLUSION

For the above reasons, and those in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,
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November 22, 2004

(12)

Supreme Court, U.S.
FILED
JAN 2 6 2005
OFFICE OF THE CLERK

No. 04-495

# In The Supreme Court Of The United States

REGINALD WILKINSON, et al.,
*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,
*Respondents.*

*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: OCTOBER 8, 2003
CERTIORARI GRANTED: DECEMBER 10, 2004

No. 04-495

# In The Supreme Court Of The United States

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REGINALD WILKINSON, et al.,
*Petitioners,*

v.

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*Respondents.*

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*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
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PETITION FOR WRIT OF CERTIORARI FILED: OCTOBER 8, 2003
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## TABLE OF CONTENTS

Page

**Selected Docket Entries**

*Austin v. Wilkinson et al.*, No. 4:01-CV-01171-JG (U. S. District Court for the Northern District of Ohio (Youngstown)) ..... 1

*Austin v. Wilkinson*, No. 02-3429 (U. S. Court of Appeals for the Sixth Circuit) ..... 7

*Austin v. Wilkinson*, No. 02-3816 (U. S. Court of Appeals for the Sixth Circuit) ..... 9

**Regulations, Policies, and Publications**

Ohio Admin. Code § 5120-9-53 Joint Exhibit VII ..... 11

Ohio Dep't of Rehabilitation and Correction Policy 111-07 with Forms (effective Mar. 1, 2002), ..... 15

Ohio Dep't of Rehabilitation and Correction Policy 111-07 with Forms (effective May 22, 2002), ..... 70

Plaintiffs' Exhibit 3, Ohio Dep't of Rehabilitation and Correction Policy 501.36 (effective Dec. 22, 2000) ..... 135

Chase Riveland, *Supermax Prisons: Overview and General Considerations* (U. S. Dep't of Justice, Nat'l Inst. of Corrections 1999) ..... 158



Page

**Exhibits**

Plaintiffs' Exhibit 10 (partial), Appx. B: Summary of Inmate Profiles and Accompanying Tables ..... 165

Austin Exhibit 5 ..... 169

Austin Exhibit 8 ..... 175

Benge Exhibit 9 ..... 177

Benge Exhibit 15 ..... 178

DeJarnette Exhibit 2 ..... 180

DeJarnette Exhibit 3 ..... 181

DeJarnette Exhibit 5 ..... 183

DeJarnette Exhibit 9 ..... 184

DeJarnette Exhibit 11 ..... 189

Gardner Exhibit 1A ..... 192

Gardner Exhibit 1B ..... 194

Gardner Exhibit 1C ..... 196

Gardner Exhibit 3 ..... 197

Gardner Exhibit 5 ..... 200

Lane Exhibit 1 ..... 210

**Page**

Robb Exhibit 12.....212

Robb Exhibit 14.....213

Roe Exhibit 1.....215

Roe Exhibit 2.....217

Roe Exhibit 6.....227

Roe Exhibit 10.....230

Thompson Exhibit 4.....233

Thompson Exhibit 6.....236

Thompson Exhibit 7.....239

Tolliver Exhibit 9.....241

Tolliver Exhibit 4.....244

Affidavit of Mathew Meyer.....246

Deposition of Reginald Wilkinson,
Director of the Ohio Dep't of
Rehabilitation and Correction.....249

**Transcript Excerpts**
**U.S. District Court for the Northern District of Ohio**
**January 7-10, 2002 (Vols. 1-4)**

Testimony of James Fellner.....264

Testimony of Peter Davis.....273



**Page**

Testimony of Todd Ishee.....310, 316

Testimony of Bernard Ryznar.....312

Testimony of Chase Riveland.....364

Testimony of James Austin.....431

Testimony of Matt Meyer.....454

Testimony of Stephen Huffman.....457

Testimony of Terry Collins.....464

[The following reproduction includes
only selected docket entries.]

United States District Court
For The Northern District Of Ohio (Youngstown)
Civil Docket For Case #: 4:01-CV-01171-JG

Austin v. Wilkinson et al.

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DOCKET ENTRIES

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| Filing Date | # | Docket Text |
|---|---|---|
| 01/09/2001 | 1 | Complaint for Declaratory Judgment and Injunctive Relief. |
| | | * * * |
| 03/30/2001 | 17 | Answer to Complaint. |
| | | * * * |
| 04/09/2001 | 19 | First Amended Complaint Adding New Parties. |
| 04/09/2001 | 20 | First Amended Complaint Adding New Party. |
| | | * * * |
| 05/10/2001 | 27 | Answer to Amended Complaint |
| | | * * * |



| | | |
|---|---|---|
| 02/25/2002 | 227 | Opinion and Order signed by Judge James S. Gwin on 2/25/02 that the Court finds the plaintiff inmates have a liberty interest entitled to constitutional protection. Because of the length of placement in its severely restrictive conditions, incarceration at the OSP imposes an atypical and a significant hardship upon inmates. The defendants have violated the plaintiff class's right to due process by denying the plaintiffs adequate notice, adequate hearing, and sufficiently detailed decisions. Having found that the defendants violated, and will continue to violate, the plaintiffs' constitutionally protected liberty interest, the Court orders the parties to file, within fourteen days of the publication of this judgment, proposed injunctive orders, extending no further than necessary to correct the violation of the federal right set out in this opinion in a way that is the least intrusive means to correct the violation. |
| | | * * * |
| 03/26/2002 | 259 | Order signed by Judge James S. Gwin on 3/26/02 previously the Court held that the defendants violated the plaintiff class's right to due process by denying the plaintiffs adequate notice, adequate hearings, and sufficiently detailed decisions |

concerning their placement at the OSP. Because the defendants have violated the plaintiffs' constitutionally protected liberty interest, the Court orders the least intrusive means to correct the violation. The Court will retain jurisdiction over this matter for the purpose of enforcement. This injunction shall terminate in two years upon the motion of either party unless the Court finds that prospective relief is needed to correct an ongoing violation of a federal right.

| | | |
|---|---|---|
| 03/26/2002 | 260 | Judgment signed by Judge James S. Gwin on 3/26/02 that the Court has issued its injunctive order in the case. The defendants will submit proposed changes to Policy 111-07 in accordance with that order within thirty days for approval by the Court. This action is terminated under Rule 58 of the Federal Rules of Civil Procedure. |

* * *

| | | |
|---|---|---|
| 04/17/2002 | 268 | Notice of Appeal to the USCA for the 6th Circuit from opinion and judgment dated March 26, 2002 filed by all defendants. |

* * *

| | | |
|---|---|---|
| 05/15/2002 | 284 | Order signed by Judge James S. Gwin on 5/15/02 that having reviewed the defendants' proposed policy 111-07, |



the plaintiffs' response to the policy, and the defendants' reply, the Court adopts the defendants' 4/24/02 proposed policy with the changes contained within this order.

* * *

| | | |
|---|---|---|
| 07/12/2002 | 311 | Order signed by Judge James S. Gwin on 7/12/02 denying defendants' motion seeking partial relief from judgment. |

* * *

| | | |
|---|---|---|
| 07/12/2002 | 313 | Notice of Appeal to the USCA for the 6th Circuit from orders of May 15, 2002 (Doc. No. 284) and July 12, 2002 ( Doc. No. 311) filed by all defendants. |

* * *

| | | |
|---|---|---|
| 12/23/2002 | 358 | Motion for order to enforce Court's Orders of February 25, 2002, March 26, 2002, May 15, 2002, and July 12, 2002, filed by all plaintiffs. |

* * *

| | | |
|---|---|---|
| 05/15/2003 | 414 | Order signed on 5/15/03 by Judge James S. Gwin. The Court grants the plaintiffs' motion to enforce in part and denies it in part. The Court finds that the defendants have violated parts of the Court's prior orders but it denies the plaintiffs' request for |

- Adjustment/behavior after placement
- Interaction with others (staff and/or inmates)
- The offender recognizes and acknowledges factors contributing to the commission of the placement offense and nature
- Other Factors which indicate a risk of future violence

The committee will use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. The privilege level review will be in a narrative form to record the factors considered by the evaluating employee. The inmate will appear before the Privilege Level Review Committee to ensure that he has the opportunity to have input into the process and respond to questions the committee may have during the review. The Privilege Level Review Committee will consist of a Unit staff member, a Custody staff member, and a Warden's designee. They may consult with any other staff person (Mental Health, Medical, Executive Staff, etc.) during the course of the review process.

**G. Privilege Level Review for Level 4**

Inmates placed in level 4 shall receive privilege level reviews during the time between annual supervision reviews. The annual supervision review procedures are more fully described below. The provisions of this section pertain only to privilege levels within the assigned security level.

Privilege level 4B is an entry level privilege status. Placement in 4B is for an indeterminate period. Inmates classified into Level 4B shall have an assessment



completed every six months. Inmates who are in privilege level 4B and have been reviewed pursuant to this subsection may be placed in privilege level 4A.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express his objections and explain his current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his eligibility for reduction. The first assessment will take place six months after the initial placement, and will continue every six months thereafter.

The Privilege Level Review Committee will make a recommendation to the Warden/Designee to either continue the inmate in 4B or reduce him to 4A, supported by a written rationale. The Warden/Designee shall then render a decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.

**H. Privilege Level Review for Level 5**

Inmates placed in level 5 shall receive level reviews during the time between annual supervision reviews. The annual supervision procedures are more fully described below. The provisions of this section pertain only to privilege levels within the assigned security level. Inmates classified into Level 5B shall have an

assessment completed every three months; inmates classified as Level 5A shall have an assessment completed every six months.

Placement in Level 5 is for an indeterminate period. Privilege level 5B is an entry level privilege status. Inmates who are in privilege level 5B and have been reviewed pursuant to this subsection may be placed in privilege level 5A.

The Privilege Level Review Committee will consist of three members, designated by the Warden/Designee, such as the inmate's Unit Manager, Case Manager (to comment on educational programming, and other programming), Mental Health staff, and/or a custody staff person.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express his objections and explain his current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his eligibility for reduction. The first review for 5A inmates will take place six months after the initial placement, and will continue every six months thereafter. The first review for 5B inmates will take place three months after the initial placement, and will continue every three months thereafter.

At the annual (one-year) review a Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636) will be completed — regardless of the recommendation — affording the inmate the normal classification review and appeals process.



The Review Committee will make a recommendation to the Warden/Designee to either continue the inmate in 5B, or to reduce him to 5A, supported by a written rationale. The Warden/Designee shall then render a final decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.

**I. Annual Supervision Review:**

All Level 4 and Level 5 inmates will have supervision reviews completed at least annually. The classification Committee shall consist of three members, which may include the Deputy Warden of Operations/Designee, the Unit Management Administrator, a Unit Manager, a Case Manager and/or other Unit Staff member and may include a Mental Health staff. All annual reviews must include a Director's designee to review all pertinent information and make a recommendation.

The inmate is to be served with a Notice of Hearing 48 hours prior to the hearing, and afforded the opportunity to appear before the entire committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 4 or 5 placement. The inmate will be afforded the opportunity to submit a written statement to the committee. The committee shall make a comprehensive review of the inmate's institutional

adjustment and behavior, including his behavior since placement in level 5 in order to make an assessment of the risk to safety and security posed by such an inmate.

This committee shall review the completed Privilege/ Security Level Review, Level 5B, 5A & 4B Form (DRC2634, DRC2636), and will take into consideration at a minimum the following information:

- Reason for placement in Level 4 or 5 and relevant circumstances;
- Conduct Reports;
- Current privilege level;
- Time served in current privilege level;
- Total time spent in level 5 and/or level 4;
- Time left to spend on current sentence;
- Time since last incident that resulted in inmate being designated level 5 or 4;
- Program Involvement;
- Behavior in the last five years, including prior to Level 4 or 5 classification;
- Security level prior to placement;
- Adjustment/behavior after placement;
- Factors which indicate a risk of future violence;
- Interaction with others (staff and/or inmates);
- Recognition and acknowledgment of the factors contributing to the commission of the placement offense and nature;
- The findings and recommendations of the previous assessment committees;
- Previous review committees;
- The findings and recommendations of all assessment committees subsequent to the placement in level 4 or level 5;
- The findings and recommendations of all supervision review committees subsequent to placement in level 4



or level 5;

The committee will use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. The classification committee shall review the completed Privilege / Security Level Review, Level 5B, 5A & 4B Form and any other relevant information. The committee shall review and evaluate the factors listed above, the circumstances underlying the placement in Level 4 or 5, the reasons for initial placement, the inmate's subsequent actions and his demonstrated attitude. The committee shall determine whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security, within their professional correctional judgment. The committee shall make a recommendation to reduce or continue the inmate's security level accordingly. The committee shall identify the basis for its decision and the factors relied upon. If the committee believes the inmate presents a threat to security of a general population institution, the committee shall document their conclusions as to the inmate's risk and their reasons.

The classification committee shall forward its recommendation to the Warden/Designee. The Warden/Designee shall review the Privilege / Security Level Review, Level 5B, 5A & 4B Form and all other information presented, and approve or disapprove the recommendation. If the warden approves the recommendation, he or she shall submit the recommendation and the approval to the Bureau of Classification for final disposition. The inmate shall be notified of the warden's approval of the recommendation and may file a formal objection to the

recommendations of the classification committee and warden with the Bureau of Classification within fifteen days of the date he is served with the committee's recommendation and warden's action.

The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a decision.

Security Designation Long Form: Form Nos. DRC2568, DRC2630, DRC2569
Supervision Review Forms: DRC2098, DRC2094, DRC2629, DRC2338
Notice of Hearing Form: DRC2598
Information Presented by the Inmate: DRC2627
Information Presented by Staff: DRC2628).
Classification Committee Report Level 5 Placement, DRC2637, DRC2638, DRC2639
Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636)

**RECOMMENDED PRIVILEGE LEVELS FOR LEVELS 5 AND 4:**

| | Level 5B | Level 5A | Level 4B | Level 4A |
|---|---|---|---|---|
| Clothing | 3 State Issue Uniforms | 3 State Issue Uniforms | 3 State Issue Uniforms | 3 State Issue Uniforms |
| Privilege Level Review | 3 Months | 6 Months | 6 Months | N/A |
| Classification Status Review | Annually | Annually | Annually | Annually |
| Phone Calls | One ten minute call per month. All others only by request of Attorney of Record or confirmed serious illness or death in the family | Two ten minute calls per month. All others only by Request of Attorney of Record or confirmed serious illness or death in the family. (Warden's Discretion) | One ten minute call per week. All others only by request of Attorney of Record or confirmed serious illness or death in the family (Warden's Discretion) | 2 times per day |

| | | | | |
|---|---|---|---|---|
| | (Warden's Discretion) | | | |
| Recreation | 5 one-hour periods per week, inside or outside recreation areas. | 5 one-hour periods per week; inside or outside recreation areas. Congregate recreation opportunity with at least one other inmate. | 5 one-hour periods per week; inside or outside recreation pods. Congregate recreation with at least one other inmate. | Seven 1- ½ hour periods per week |
| Shaving | 3 times per week | 3 times per week | 5 times per week | Any-time during the day. |
| Shower | 5 times per week | 5 times per week | 5 times per week | Twice per day. |
| TV | State Issued or purchase from commissary. Programming only. | State Issued or purchase from commissary Programming and Network. | Network and Institutional programming provided on range TV. Movie rentals on weekends and holidays. | May have personal TV |

| | | | | |
|---|---|---|---|---|
| Walkman | None | Walkman w/ AM/FM w/cassette player. No cassettes permitted. Battery operated. | Walkman/Cassette AM/ FM w/cassette player. Battery operated. Five (5) cassettes permitted. | Commissary Purchase or Approved vendor |
| Visits | Non-Contact, 2 visits per month, per visitor for up to 2.5 hours; Attorney of Record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 3.5 hours, Attorney of Record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 4 hours, Attorney of Record, Clergy of Record. | Contact, 2 visits per month per visitor for up to 7 hours. |
| Library/ Legal Service | Library: 3 paper-back books Legal: Per kite to Paralegal. | Library: 4 paperback books Legal: Per kite to Paralegal. | Library: 5 paperback books Legal: Per kite to paralegal. | Minimum 4 1/2 hours per week. |
| Program-ming | Broadcast over TVs provided in each cell Small group program-ming in program booths | Broadcast over TVs provided in each cell Small group programming in program booths | Broadcast over TVs provided on range. Small group counseling, no more than four inmates. | Broadcast over TVs; Small group counseling. |

| | | | | |
|---|---|---|---|---|
| Commissary Spending Limit Twice Per Month | $30.00 | $50.00 | $70.00 | $100. |

(Petitioner's Note: forms associated with this policy were omitted; see R., Def. Ex. C.)

(3)

No. 04-495

Supreme Court, U.S.
FILED
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In The
# Supreme Court of the United States

REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

## COUNTER STATEMENT OF QUESTION PRESENTED

When it is established that confinement at a super-maximum security prison imposes an "atypical and significant hardship" on those imprisoned there, thus giving rise to a constitutionally-protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995), is it appropriate in determining what process is due to weigh private and public interests and the risk of error pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTER STATEMENT OF QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| REASONS FOR DENYING THE WRIT | 1 |
| I. PETITIONERS INCLUDE IN THE APPENDIX THE WRONG VERSION OF THE PROCEDURAL REQUIREMENTS AT ISSUE, AND MISSTATE CRUCIAL FACTS FOUND BY THE COURTS BELOW | 1 |
| II. PETITIONERS MISREPRESENT THE ANALYSIS AND HOLDING OF THE COURT OF APPEALS | 5 |
| III. THE RELIANCE OF THE COURTS BELOW ON *MATHEWS V. ELDRIDGE* IS CONSISTENT WITH THE DECISION OF THIS COURT IN *HEWITT V. HELMS* | 7 |
| IV. NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL EXISTS ON THE ISSUE DECIDED BY THE COURT OF APPEALS | 9 |
| V. THE COURTS BELOW REASONABLY BALANCED THE COMPETING INTERESTS SET FORTH IN *MATHEWS V. ELDRIDGE* BASED ON THE EXTENSIVE FACTUAL RECORD AT TRIAL | 12 |
| CONCLUSION | 16 |




## TABLE OF AUTHORITIES


| | Page |
|---|---|
| CASES | |
| *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) | *passim* |
| *Austin v. Wilkinson*, 189 F. Supp.2d 719 (N.D. Ohio 2002), *aff'd in part and rev'd in part*, 372 F.3d 346 (6th Cir. 2004) | 6 |
| *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997) | 10 |
| *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985) | 10 |
| *Crosby-Bey v. District of Columbia*, 786 F.2d 1182 (D.C. Cir. 1986) | 10 |
| *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999) | 10 |
| *Hewitt v. Helms*, 459 U.S. 460 (1983) | *passim* |
| *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) | 11 |
| *Mathews v. Eldridge*, 424 U.S. 319 (1976) | *passim* |
| *Mims v. Shapp*, 744 F.2d 946 (3rd Cir. 1984) | 11 |
| *Sandin v. Conner*, 515 U.S. 472 (1995) | *passim* |
| *Shoats v. Horn*, 213 F.3d 140 (3rd Cir. 2000) | 11 |
| *Vitek v. Jones*, 445 U.S. 480 (1980) | 13 |
| *Wolff v. McDonnell*, 418 U.S. 539 (1974) | *passim* |

## REASONS FOR DENYING THE WRIT

### I. PETITIONERS INCLUDE IN THE APPENDIX THE WRONG VERSION OF THE PROCEDURAL REQUIREMENTS AT ISSUE, AND MISSTATE CRUCIAL FACTS FOUND BY THE COURTS BELOW[1]

#### A. Petitioners Include In The Appendix The Wrong Version Of The Procedural Requirements At Issue

Petitioners state: "The procedure for classifying inmates as Level 5 is contained in ODRC Policy 111-07, issued January 3, 2002." Petition at 6. This is error. As explained by the Court of Appeals:

> [T]he case was scheduled for trial in January 2002. On the eve of trial, the ODRC released a new version of 111-07 ("new 111-07"), and it is the district court's ordered modifications to new 111-07, made after a bench trial, that are at issue on this appeal.

App. 5a.

Thus, the procedures at issue on this appeal are contained in Petitioners' Policy 111-07 as modified by the District Court after trial and post-trial briefing. But the version of ODRC Policy 111-07 which appears in the Appendix as Appendix E, App. 122a-144a, is the policy "Issued January 3, 2002," before trial, not the policy as modified by the District Court pursuant to its Orders of

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[1] See Supreme Court Rules 14.5 and 15.2.

March 26, 2002 (Appendix C) and May 15, 2002 (Appendix B).[2]

Nowhere in Petitioners' papers will this Court find the procedures it is being asked to assess.

### B. Petitioners Misstate Crucial Facts Found By The Courts Below

Petitioners' "Statement of the Case" contains misstatements as to both procedure and substance.

#### 1. Procedure

Petitioners' error in providing this Court with a set of procedures not on appeal, and omitting the procedures actually at issue, leads to a series of misstatements in Petitioners' Statement of the Case. Among these misstatements are the following:

The current procedure for classifying inmates as Level 5 is not "contained in ODRC Policy 111-07, issued January 3, 2002." Petition at 6.

The events alleged by Petitioners at 6 to "trigger" the placement of a prisoner in supermaximum security – a finding by a Rules Infraction Board or a conviction for a new crime committed while in prison – are nowhere

[2] The policy that appears on the internet at http://156.63.250.98 as 53-CLS-04 incorporates the modifications required by the District Court. 53-CLS-04 "supersedes: 111-07 dated 5/22/02" in the sense that it gives that policy a new number, but is substantively identical with Policy 111-07 dated May 22, 2002, not with Policy 111-07 dated January 3, 2002.



mentioned in cited section VI(C) of Policy 111-07, which is reproduced at App. 127a-130a.

Procedures for "Placement in Level 5," App. 127a-130a, do not include preparation of a written report that broadly reviews the inmate's characteristics and conduct, nor is "age" or "time remaining on sentence" listed among the placement criteria, as indicated in the Petition at 6-7.

In their Petition at 7-8, Petitioners cite "Security Designation (Long Form), App. 144a," "Notice of Hearing Form, App. 144a," "Classification Committee Report Form, App. 144a," and "Privilege/Security Level Review Form, App. 144a," but no such forms appear at App. 144a.[3]

The Petition states at 7 that the classification committee makes a recommendation to the Warden "that includes a narrative description of 'the nature of the threat the inmate presents and the committee's reasons for the recommendation.'" However, the quoted words nowhere appear in the cited pages of Policy 111-07 at App. 127[a]-130a.

In describing the process for evaluating whether a prisoner should be retained at the Ohio State Penitentiary, Petitioners state that the first factor considered is "the prisoner's underlying criminal offense." Petition at 7. In fact, this factor is not among the eighteen (18) factors listed in the version of Policy 111-07 contained in the Appendix at 138a-139a (nor in Policy 111-07 as modified by the District Court).

[3] See App. 144a: "(Petitioner's Note: forms associated with this policy were omitted; see R., Def. Ex. C.)"

### 2. Substance

In Section A of Petitioners' Statement of the Case, Petitioners conclude: "The usual stay at OSP [Ohio State Penitentiary] is at least a year." Petition at 5. This statement is misleading. What the District Court actually found as fact was:

> The vast majority of inmates placed at the OSP will remain for a minimum of two years, with only an annual review of their status. To date [February 2002], two hundred OSP prisoners have been there for more than three years.

App. 90a. The trial court also observed:

> Even with good behavior, inmates at OSP serve indefinite terms at the institution. With the exception of the end of their sentences, there is no other indication of how long an individual inmate will be kept at the institution.

App. 91a.

Section C of Petitioners' Statement of the Case, entitled "The proceedings below," and Petitioners' "Question Presented," are not based on what the Court of Appeals found.

Petitioners state that plaintiffs "claim" that "they have a liberty interest in staying out of supermax," Petition at 8. However, Petitioners do not appeal this holding of the courts below and must be understood no longer to contest it.

Petitioners state that a majority of the Court of Appeals held that "all deprivations significant enough to implicate a liberty interest under *Sandin v. Conner*, 515



U.S. 472 (1995) are serious enough to create a presumption that *Wolff*-type procedures are necessary." Petition at 10, citing App. 23a. There is no mention of *Wolff v. McDonnell*, 418 U.S. 539 (1974), on the cited page of the opinion of the court below.

In their Question Presented, Petitioners represent that this is a case in which "prison regulations create a liberty interest for the prisoner in avoiding [supermaximum security] placement." In fact, the Court of Appeals found that a liberty interest was created because placement at "OSP constitutes an atypical and significant hardship under *Sandin*." App. 14a. This error, ignoring the balancing of harm to the prisoner against the interests of the state, infuses Petitioners' whole approach.

Petitioners concede that all three members of the court of appeals panel called "for an independent vetting of Ohio's process under the formula set in *Mathews v. Eldridge*, 424 U.S. 319 (1976)." Petition at 10. Nevertheless, as Respondents show below, this does not prevent Petitioners from inaccurately alleging that the Court of Appeals opted for *Wolff* rather than *Hewitt v. Helms*, 459 U.S. 460 (1983). Respondents will proceed to demonstrate that what the Court of Appeals actually did was to reject a methodology of mechanically choosing between *Wolff* and *Hewitt* on the basis of the purported nature of the decision involved, instead advocating the interest-balancing methodology of *Mathews v. Eldridge*.

## II. PETITIONERS MISREPRESENT THE ANALYSIS AND HOLDING OF THE COURT OF APPEALS

Petitioners assert that the Court of Appeals followed the Ninth Circuit in requiring "*Wolff*-type proceedings,"

bringing the Sixth and Ninth Circuits into conflict with the Third, Eighth and D.C. Circuits. Petition at 8-10, 11-19, especially 17.

Petitioners misrepresent the analysis and holding of the court below.

First, it should be noted that in their petition to this Court, Petitioners no longer contest the finding of the District Court, affirmed by the Sixth Circuit, that confinement at the Ohio State Penitentiary imposes an atypical and significant hardship, and thereby gives rise to a constitutionally-protected liberty interest. See *Austin v. Wilkinson*, 189 F. Supp.2d 719, 737-742 (N.D. Ohio 2002), *aff'd in part and rev'd in part*, 372 F.3d 346, 353-355 (6th Cir. 2004); App. 9a-15a, 85a-90a. The sole concern of the Petition for Certiorari is: a liberty interest having been established, what process is due?

Second, in summarily assigning the court below to a putative group of circuit courts of appeal that follow *Wolff* rather than *Hewitt*, Petitioners disregard the plain statement of all members of the circuit court panel that what they termed the "*Hewitt/Wolff* dichotomy" is "not a viable form of analysis." App. 19a n.10. The burden of placement or retention for an indefinite period of years in a supermaximum security prison is far weightier than the burdens at issue in either *Wolff* or *Hewitt*. The court below insisted that the District Court correctly began its analysis by weighing the interests at stake pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than by focusing on whether a given decision was retrospective and disciplinary or prospective and administrative. App. 18a-24a.

The opinion below emphasized that Petitioners, both in their brief and at oral argument, identified as most



burdensome the procedure mandated by the District Court "requiring officials to limit their placement decision to only those matters detailed in the notice given to the inmate." App. 23a. The opinion went on to find this requirement appropriate in view of the fact that Petitioners' own policy limits the state's discretion in placing or retaining prisoners at the OSP by specifying "certain factual predicates, all of which are historical in nature." *Id.* Then, having found that the additional procedural requirement identified by the state as most burdensome "passes muster under *Mathews v. Eldridge*," the court below concluded that procedures imposing a lesser burden than notice are also appropriate. App. 24a.

In sum, what the court below did was to analyze the specific facts established at trial of this case pursuant to the three-part test set forth in *Mathews v. Eldridge*, and to hold that the procedural requirements mandated by the District Court were appropriate in light of this analysis. This is not following *Wolff* rather than *Hewitt*. As the Sixth Circuit explicitly stated, this is rejecting the *Wolff/Hewitt* dichotomy and instead assessing particular procedures required when the *Mathews* factors are applied to a specific set of facts.

## III. THE RELIANCE OF THE COURTS BELOW ON *MATHEWS V. ELDRIDGE* IS CONSISTENT WITH THE DECISION OF THIS COURT IN *HEWITT V. HELMS*

Petitioners claim that the use of the *Mathews* balancing test by the District Court and the Court of Appeals is inconsistent with this Court's decision in *Hewitt*. On the contrary, the Supreme Court in *Hewitt* also applied the *Mathews* balancing test. 459 U.S. at 473-474. What made

the result below different is that the factual record here is different than the factual record in *Hewitt*.

In contrast to the short-term administrative segregation experienced by the plaintiff prisoner in *Hewitt*, the class of plaintiff prisoners in *Austin* were placed in the supermax and denied the opportunity for either transfer or parole, not for weeks, but for an indefinite term of years. Moreover here, in contrast to *Hewitt*, the courts below relied on a record demonstrating a substantial risk of erroneous decision-making.

The courts below in this case applied the same balancing test used in *Hewitt* to a dramatically different set of facts. *Hewitt* itself began by noting that the "requirements imposed by the [Due Process] Clause are, of course, flexible and variable dependent upon the particular situation being examined." 459 U.S. at 472. Because the administrative segregation at issue in *Hewitt* was short-term (during investigation to determine whether there was probable cause that would lead to a disciplinary hearing), did not carry a stigma (of having engaged in serious misconduct), and would not have any significant effect on the prisoner's parole opportunities, the Court found that the prisoner's private interest in being free from administrative segregation was "not one of great consequence." *Id.* at 473, 476. Here the facts are dramatically different: the conditions of confinement impose an atypical and significant hardship, the segregation is long-term after a finding of serious misconduct, and parole is irrebuttably prohibited for as long as the prisoner is incarcerated at the Ohio State Penitentiary. Because of the factual differences between the Ohio State Penitentiary case and the unusual circumstances affecting the individual in *Hewitt*, the District



Court and the Court of Appeals reached a different conclusion here.

## IV. NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL EXISTS ON THE ISSUE DECIDED BY THE COURT OF APPEALS

Petitioners claim that the Third, Eighth and D.C. circuits have decided, contrary to the Ninth and Sixth circuits, that *Sandin*'s new framework for analysis leaves unaffected the concept that the minimal due process protections set forth in *Hewitt* are sufficient for all administrative placement decisions.

We have shown above that this argument misrepresents what the courts below held in the present case (*supra*, II), and what this Court held in *Hewitt* (*supra*, III). Petitioners have also misstated the positions of other circuit courts of appeal.

The Sixth Circuit Court of Appeals in this case addressed the question whether

> *Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic way in which they applied the *Hewitt/Wolff* dichotomy. After *Sandin*, both steps of the analysis – the creation of a liberty interest and the determination of the process due to protect that interest – must carefully reference the severity of the deprivation at stake.

App. 18a.[4]

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[4] The Court in *Sandin* abandoned "*Hewitt*'s methodology" without overruling the holding in *Hewitt*. "Our decision [in *Sandin*] only

(Continued on following page)

Even a cursory reading of the cases cited by Petitioners show that most were decided prior to *Sandin*. There was no way such a case could evaluate the impact of a case not yet decided.

For example, *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985), cited by Petitioners, was decided almost a decade before this Court decided *Sandin*. To demonstrate that a conflict exists among the circuits after *Sandin*, Petitioners have to show that the Eighth Circuit still maintains its position in *Clark*. They cite no authority in support of that proposition.

So too, of the two D.C. Circuit cases cited by Petitioners, one, *Crosby-Bey v. District of Columbia*, 786 F.2d 1182 (D.C. Cir. 1986), predates *Sandin* and therefore could not have addressed the issue that *Sandin* decided. The other, *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), was a post-*Sandin* case in which the court never determined whether the prisoner there had a liberty interest and therefore never had to face the issue of whether the determination that an atypical and significant hardship exists affects the determination of the amount of process due. The *Brown* court noted: "If Brown had shown that the Housing Board's finding that he had assaulted a guard was treated for parole or other purposes as equivalent to a disciplinary finding to this effect, . . . this might indicate that more extensive procedural protections were warranted." *Id.*, 131 F.3d at 171 n.8. And in another administrative segregation case two years after *Brown*, *Hatch v. District of Columbia*,

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abandons an approach that in practice is difficult to administer and which produces anomalous results." 515 U.S. at 483 n.5.



184 F.3d 846 (D.C. Cir. 1999), the Circuit expressly recognized that it had not decided whether *Hewitt* or *Wolff* protections apply once a liberty interest is held to exist, stating that it "need not decide the applicability of *Wolff*" because the prisoner plaintiff had not received the process due under *Hewitt*. *Id.*, 184 F.3d at 852.

Similarly, the Third Circuit's decision in *Mims v. Shapp*, 744 F.2d 946 (3rd Cir. 1984), was pre-*Sandin*, and its post-*Sandin* decision in *Shoats v. Horn*, 213 F.3d 140 (3rd Cir. 2000), never squarely faced the question raised here of whether *Sandin* "called into question . . . the mechanistic fashion in which [the circuit courts] applied the *Hewitt*/*Wolff* dichotomy." App. 18a. The Third Circuit found that a post-*Sandin* liberty interest existed and then applied the *Hewitt* procedural analysis. But Shoats apparently never argued that *Hewitt* procedures were inadequate. Rather, he contended that his continued long-term confinement in administrative segregation was based solely on his past criminal history and on the purported bias of the decision-maker, arguments the Circuit rejected. *Id.*, 213 F.3d at 146. The Third Circuit nowhere discussed the question that the Sixth Circuit decided, namely, whether *Sandin* requires changing the mechanistic application of the *Hewitt*/*Wolff* dichotomy as to what process is due.

The only other circuit to address the issue with which the Sixth Circuit grappled here is *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). It did so in cursory fashion, simply noting the statement in *Sandin* that "the time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*." *Id.* at 1089, quoting *Sandin*, 515 U.S. at 483.

There is a reason for the paucity of circuit court decisions on the issue decided by the circuit court in this case: *Sandin*'s focus on the severity of the deprivation has dramatically reduced the number of cases in which prisoners have established a liberty interest. *Sandin* emphasized the severity of deprivation because this Court was concerned to avoid cases based on state regulations where prisoners claimed a liberty interest in "receiving a tray lunch rather than a sack lunch" or "receiving a paperback dictionary." 515 U.S. at 483.

The decision below appears to be the first to have found a liberty interest for all prisoners confined in a supermaximum security prison and, as is conceded by Petitioners, such confinement imposes an atypical and significant hardship giving rise to a constitutionally-protected liberty interest for all imprisoned there. "Any liberty interest which passes *Sandin*'s threshold," the Sixth Circuit concluded, "comes with a higher presumption of process due than those which may have been found pre-*Sandin*." App. 22a n.12.

No circuit court of appeals other than the Sixth Circuit has thus far clearly addressed the question presented here. This Court need not do so now.

## V. THE COURTS BELOW REASONABLY BALANCED THE COMPETING INTERESTS SET FORTH IN *MATHEWS V. ELDRIDGE* BASED ON THE EXTENSIVE FACTUAL RECORD AT TRIAL

The Court of Appeals reasonably balanced the three factors outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), based on an extensive and detailed trial record.



The balancing test articulated in *Mathews* has three components: the private interest, the risk of erroneous deprivation of such interest, and the Government's interest.[5]

The first element is "the private interest that will be affected by the official action." 424 U.S. at 335; App. 19a. The Court of Appeals considered that

> placement at OSP is indefinite and reviewed only annually. . . . Prisoners placed at OSP are deprived of all significant human contact and have other restrictions placed upon their movement and their personal privileges; they are also ineligible for parole during their stay at OSP.

App. 21a; see also the Court of Appeals' summary of the District Court's findings at 10a. As to this first of the

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[5] *Wolff* preceded and foreshadowed the *Mathews v. Eldridge* balancing test which the Sixth Circuit followed. According to *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974):

> We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v McElroy, 367 US at 895, 6 L Ed 2d 1230. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Ibid.; Morrissey, 408 US, at 481, 33 L Ed 2d 484, 92 S Ct 2593.

And, at 567, *Wolff* states, "Rules of procedure may be shaped by consideration of the risks of error, [citations omitted], and should also be shaped by the consequences which will follow their adoption." While not referring to *Mathews*, the Supreme Court in *Vitek v. Jones*, 445 U.S. 480 (1980) found that the District Court had properly identified and weighed the relevant factors: the interest of the State, the interest of the prisoner, and the risk of error.

*Mathews* factors, the Court of Appeals found the private interest at stake in this case "significant." App. 21a.

The second *Mathews* factor is "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335; App. 19a. Here the Court of Appeals found that "the district court made specific findings concerning past erroneous and haphazard placements at OSP, which go unchallenged on appeal." App. 22a. "[I]n the face of the substantial factual findings of the district court as to haphazard ODRC placements," the Court of Appeals determined, "the procedural requirement of notice is particularly important"; accordingly it gave "great weight to its [the notice requirement's] value in increasing accuracy." App. 19a-20a n.11.

The final *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335; App. 19a. Regarding this final component of the test, the court below emphasized that Petitioners were seeking to have it both ways:

> Having set out a detailed and restricted list of reasons why inmates can be put at OSP, the ODRC cannot turn around and argue that the district court's order decreases their ability to rely on "rumor, reputation, and even more imponderable factors," for those factors are illegitimate under their own placement scheme.

App. 23a. The Court of Appeals reasonably concluded "that many of the procedures ordered by the district court are



an attempt to reconcile an elaborate administrative appeals scheme created by the ODRC Officials with the requirement that the inmate know the reason for any decision made about his fate. . . . " App. 24a.

The Court of Appeals recognized that the type of decision being made will be a "factor" in a court's decisions. App. 19a-20a n.11. But, as explained by the Court of Appeals below, at App. 18a-19a,

> It is not enough to say that a particular decision is "forward-looking"; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance.

Nothing in the decisions of the courts below require this Court's intervention.

## CONCLUSION

For the above-stated reasons, Respondents urge this honorable Court to deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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**In The Supreme Court Of The United States**

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REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# REPLY BRIEF FOR THE PETITIONER

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## TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

A. The decision below conflicts with the Court's decisions because it rejects *Hewitt's* application of *Mathews* and because it misreads *Sandin* to do so ..... 2

B. The circuits are split over whether *Hewitt* controls predictive decisions such as the ones here, and that includes a split over whether *Sandin* changed *Hewitt*. ..... 6

C. Petitioners cited the right policy ..... 10

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Brown v. Plaut*,
131 F.3d 163 (D.C. Cir. 1997) .....7, 8

*Hatch v. District of Columbia*,
184 F.3d 846 (D.C. Cir. 1999) .....7, 8, 9

*Hewitt v. Helms*,
459 U.S. 460 (1983) .....*passim*

*Keenan v. Hall*,
83 F.3d 1083 (9th Cir. 1996).....7

*Mathews v. Eldridge*,
424 U.S. 319 (1976) .....*passim*

*Sandin v. Conner*,
515 U.S. 472 (1995) .....*passim*

*Shoats v. Horn*,
213 F.3d 140 (3d Cir. 2000).....7, 9

*Wolff v. McDonnell*,
418 U.S. 539 (1974), .....*passim*

## INTRODUCTION

Respondents' brief in opposition ("Opp.") confirms, rather than negates, the need for review here. For, just as the Sixth Circuit did below, Respondents here fundamentally misunderstand this Court's decisions in *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin v. Conner*, 515 U.S. 472 (1995). That misunderstanding led the panel astray, and it explains why Respondents do not see the conflict between the Sixth Circuit's decision and this Court's precedents, and why they fail to grasp the nature of the circuit split as well.

*Hewitt's* fundamental teaching was not just its holding that prisons need not establish formal, trial-type procedures to make predictive decisions about placing prisoners in higher-security settings for preventive reasons. Though this resulting holding was important, what was equally important was the principle that led to it. *Hewitt* reached this result by applying the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to this prison-placement context in a categorical way. *Hewitt* taught that no matter how the high the government's interest and the prisoner's interest in the outcome, the deciding factor would always be the third *Hewitt/Mathews* factor, regarding the cost or benefit of additional process.[1] That third factor always weighed against requiring more process—such as the formalized process required by *Wolff v. McDonnell*, 418 U.S. 539 (1974) for retrospective disciplinary proceedings—because extra process does not aid the quality of a highly subjective, predictive decision. Thus, as detailed below, the idea that the Sixth Circuit was getting back to *Mathews* when it rejected *Hewitt* (Opp. at 7) makes no sense, as *Hewitt* already provides a controlling, prison-specific version of *Mathews*, and the Sixth Circuit's contrary reading needs correction.

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[1] The added-value factor was the second factor in *Mathews*, but it was the third in *Hewitt*, so we label it as the third here.

And *Sandin*, quite simply, said nothing about any of this. It dealt only with the baseline question of *whether* a liberty interest exists, and it does not tell us what process is due once an interest exists. The panel's reliance on *Sandin*, then, for the what-process-is-due question, reflects yet another aspect of the conflict with this Court's precedent. This approach also reflects another angle to the circuit split, as some circuits have similarly adopted the errant view that *Sandin* changed the law regarding the process due, while other circuits have properly stayed the course in recognizing that *Hewitt* still controls the question of what-process-is-due when predictive prison-placement decisions are at issue.

Thus, the conflicts are real, and they require review. And as also explained below, Respondents are wrong in arguing that Petitioners discussed the "wrong version" of the prison policy at issue. Opp. at 1–2. The petition should be granted.

**A. The decision below conflicts with the Court's decisions because it rejects *Hewitt's* application of *Mathews* and because it misreads *Sandin* to do so.**

Respondents mistakenly assert that the decision below did not reject *Hewitt* in favor of *Wolff*, but that the Sixth Circuit merely rejected a "*Wolff*/*Hewitt* dichotomy," and that the Sixth Circuit merely applied *Mathews* "to a specific set of facts." Opp. at 7. Respondents are wrong, as the Sixth Circuit got it wrong on the law, not the facts, in several ways, and in doing so, it conflicted with this Court's decisions.

**First,** Respondents and the Sixth Circuit alike fail to appreciate that *Hewitt* established a general principle that the third *Mathews* factor controls in predictive prison-placement cases. To be sure, the Court in *Hewitt* did examine the first two *Mathews* factors, and it did note that the State's interest in maintaining prison safety is high, and that the prisoner's



interest is lower, given that he is already imprisoned and merely challenges his security level or conditions. *Hewitt*, 459 U.S. at 473–74. But the third *Mathews* factor, which looks to the value of additional procedural safeguards, was plainly dispositive in *Hewitt*. That is not surprising in any *Mathews* application, since after all, the ultimate question is "what process is due," so it makes sense to focus on whether extra process adds any value.

*Hewitt* explained that extra procedural safeguards would not add value because of the *nature* of the decision at issue: because placement decisions are predictive and subjective, they are "singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9. *Hewitt* specifically contrasted such predictive decisions with the retrospective factfinding that is aided by trial-type proceedings, such as in *Wolff*. *Id.* at 473–74.

Notably, this logic holds true as a categorical matter for *all* such predictive decisions, regardless of any changes in applying the other two *Mathews* factors. So any attempt to distinguish this case from *Hewitt* based on facts concerning the other *Mathews* factors—such as the claim that the placement here is more onerous than that at issue in *Hewitt*—must fail, because *Hewitt's* overriding demand is that extra process should not be required when it adds no value.

Indeed, the Sixth Circuit's decision is notable in this regard, as its purported "*Mathews* analysis" nowhere asserts that the extra process ordered would add anything. Instead, the Sixth Circuit said only, regarding the third factor, that the extra process would not burden Ohio too greatly. App. at 23a. The court mostly focused on the other factors, finding—contrary to *Hewitt's* command—that the nature of the decision did not matter as much, and that the primary factor was the weight of the prisoner's interest in avoiding

supermax placement. *Id.* at 21a–24a. Thus, the Sixth Circuit conflicted with *Hewitt*, and it did so in a categorical way, not a factbound way. That warrants review.

**Second,** the Sixth Circuit's rejection of *Hewitt* was based solely on its mistaken reading of *Sandin*, and that means that the decision below conflicts with *Sandin* as well. Notably, while the Sixth Circuit ultimately criticized and rejected what it considered a false "*Hewitt/Wolff* dichotomy," it essentially acknowledged that, even in its view, there *was* such a dichotomy pre-*Sandin*, and that it was established by this Court and was properly followed by courts below. App. at 18a–19a. As the Sixth Circuit explained it, cases fit neatly into one side or the other, *Hewitt* or *Wolff*:

> Before *Sandin*, state-created liberty interests of prisoners were either protected by an adversary hearing on the record following *Wolff* ... or a more free-form hearing following *Hewitt*.... Cases following the *Hewitt/Wolff* split have classified various factual situations depending upon the category into which the challenged process fell: disciplinary or administrative, historical or prospective, objective or subjective, *Wolff* or *Hewitt*.

App. at 18a (citations omitted). Thus, in the Sixth Circuit's view, the only question was whether *Sandin* somehow changed the *Hewitt/Wolff* framework.

On that question, the Sixth Circuit left no doubt that it thinks that *Sandin* changed everything. It first described the question as unclear: "What is much less clear after *Sandin* is how to determine what process is due to protect that interest." App. at 18a. It then concluded that *Sandin* raises the bar from *Hewitt* regarding what process is due: "We are convinced, however, that *Sandin* called into question not



only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic fashion in which they applied the *Hewitt/Wolff* dichotomy." *Id.* The court also said that *Sandin* shifted the focus from *Mathews'* third factor, regarding the value of extra process, to the first factor, regarding the inmate's interests: "After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake." *Id.*

Respondents adopt the Sixth Circuit's view that *Sandin* changed everything, and that is why, in their view, the decision below does not conflict with *Hewitt*; *Sandin*, they say, changed *Hewitt*. Petitioner Ohio, by contrast, believes that *Sandin* addressed *only* the question of when a liberty interest is created, and did not change the what-process-is-due inquiry. Thus, in our view, the court below not only conflicted with *Hewitt*, but by basing its abandonment of *Hewitt* upon a purported reading of *Sandin*, the panel conflicted with *Sandin*, too.

But more important, whether we or Respondents are right or wrong about whether *Sandin* changed *Hewitt* regarding what process is due, it seems hard to deny that our debate is a legal one about the meaning of those cases, not a factual one. Our dispute does not turn on how "harsh" conditions allegedly in Ohio's Supermax prison; our dispute turns on whether *Hewitt's* analysis survives *Sandin*. And as explained in Part B below, other circuits disagree about this same question, further amplifying the need for review.

**Third,** the Sixth Circuit not only abandoned *Hewitt*, but it plainly (and improperly) swung to the opposite pole of *Wolff*, and Respondents do not succeed in their attempt to minimize the importance of this holding. To be sure, the Sixth Circuit itself said that it was not "adopting" *Wolff*, as it

said that it was rejecting the "*Hewitt/Wolff* dichotomy," and that language suggests that in the court's view, its return to *Mathews* transcended *Wolff* as well as *Hewitt*. *Id.* at 18a–19a. So Respondents understandably parrot the court's language in disclaiming any adoption of *Wolff*. Opp. at 7.

But if we look past the labels attached (or detached) by Respondents or the Sixth Circuit, the plain mechanics of what the court *did* here show that it adopted *Wolff*-type procedures—and then some—in a case that belongs under *Hewitt*. The court acknowledged that the procedure that the district court imposed on Ohio here "closely tracks *Wolff*." App. 20a. Thus, by affirming the imposition of those procedures, the court imposed *Wolff*-type procedures in a case that does not call for them. The mere fact that the court disclaimed it was adopting *Wolff* does not change that fact.

**B. The circuits are split over whether *Hewitt* controls predictive decisions such as the ones here, and that includes a split over whether *Sandin* changed *Hewitt*.**

Just as the *Sandin* question underlies the panel's conflict with this Court's decisions, so, too, does that question underlie the circuit split. Properly understood, this further shows the need for review, and it shows why Respondents' attempt to explain away the split is unsuccessful.

First, Respondents are wrong when they wipe away all of the pre-*Sandin* cases simply on the basis that they were pre-*Sandin*. That "distinction," of course, works only if one first accepts that *Sandin* changed things on the what-process-is-due question. If, as we believe, *Sandin* did no such thing, then the conflict fairly includes all of the pre-*Sandin* cases.

Second, even looking at only post-*Sandin* cases, the split is real. On the Sixth Circuit's side of the split, the Ninth Circuit found, as the Sixth Circuit did, that *Sandin* changed



things, thus requiring *Wolff*-type proceedings rather than *Hewitt* process in a predictive-type case. *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). Respondents say only that *Keenan* analyzed *Sandin* in a "cursory fashion." Opp. at 11. The *Keenan* court, however, spent nearly two pages analyzing *Sandin*, and it dutifully followed what it (mistakenly) believed was this Court's precedent, which it thought now required *Wolff* procedures. 83 F.3d at 1088–89. The court properly explained how *Sandin* changed the liberty-interest question, but then it leapt to the conclusion that *if* a liberty interest existed, *then* the prisoner there *would be entitled to* "all of the process he was due under *Wolff*," and for support, the court cited *Sandin's* statement that it was returning to the due process principles of *Wolff*. *Id.* at 1089. So it plainly—albeit mistakenly—adopted the view that *Sandin's* "return to *Wolff*" applies to the what-process-is-due question along with the liberty-interest question. Thus, the Sixth Circuit is not alone in reading *Sandin* to have the effect of supplanting *Hewitt* and requiring *Wolff*, even for predictive decisions.

More important, on the other side of the split, both the D.C. and Third Circuits have continued to apply *Hewitt* to predictive-type cases, without changing that approach in light of *Sandin*. See *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997); *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999); *Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000).

In *Brown*, the D.C. Circuit plainly applied the "*Hewitt-Wolff* dichotomy" that the Sixth Circuit rejected: though it did not use the word "dichotomy," it contrasted *Hewitt* and *Wolff* proceedings in precisely the way that the Sixth Circuit said was no longer appropriate after *Sandin*. *Brown*, 131 F.3d at 170–71. The D.C. Circuit explained that *Hewitt* applied and required only "limited procedural safeguards" to placement decisions, such as the administrative segregation at issue in *Brown*, and it further explained that *Wolff* applied

only where retrospectively-focused disciplinary proceedings were at issue. *Id.* The D.C. Circuit did, as Respondent notes, decline to decide whether a liberty interest existed at all, but that was precisely because the court found it easier to determine that only *Hewitt* process was required, as that could have disposed of the prisoner's claims if the facts on remand showed that he received *Hewitt*-compliant (not *Wolff*-type) procedures. *Id.* at 170, 172.

Respondents also cite, curiously, a footnote in *Brown* in which the D.C. Circuit noted that *if* the prisoner had shown that the process at issue was disciplinary, as opposed to involving a predictive-placement issue, then "more extensive procedural protections" would be required. Opp. at 10 (citing *Brown*, 131 F.3d at 171 n.8). That citation is curious because the footnote confirms, rather than negates, the circuit split, as it shows how firmly the D.C. Circuit holds to the "*Hewitt/Wolff* dichotomy" that Repondents and the Sixth Circuit wish to inter. That is, the D.C. Circuit said that *if* the process were disciplinary and retrospective, it would trigger *Wolff;* otherwise, *Hewitt* controls. Compare App. at 18a ("Cases following the *Hewitt/Wolff* split have classified various factual situations depending upon the category into which the challenged process fell: disciplinary or administrative, historical or prospective....").

Similarly, the additional D.C. Circuit case that Respondents cite, *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), further confirms that the D.C. Circuit sticks to the "*Hewitt/Wolff* dichotomy." The prisoner in *Hatch* advanced two independent due-process claims: one against his placement in "administrative segregation," and one against his *separate placement* in "adjustment segregation," a disciplinary placement that was "unlike administrative segregation, punishes individuals for specific, proven acts of misconduct." *Id.* at 848. In analyzing the administrative segregation claim—i.e., the claim relevant



here—the court explained that it was undisputed that if the prisoner "had a liberty interest in avoiding administrative segregation, then *Hewitt* specifies the minimum procedures for placing him in such confinement." *Id.* at 851–52.

Separately, the *Hewitt* court analyzed the independent claim regarding the *disciplinary* segregation, and it is that part of the opinion that Respondents cite. Opp. at 11. To the extent that the D.C. Circuit left open the possibility that more extensive *Wolff*-type procedures might be required for prisoner Hatch's *disciplinary claim*, which was tied to past events, that again merely confirms the D.C. Circuit's continued commitment, post-*Sandin*, to the "*Hewitt/Wolff* dichotomy."

Finally, Respondents' attempt to explain away *Shoats*, in which the Third Circuit also continued to follow *Hewitt* post-*Sandin*, is also unsuccessful. Respondents argue that the inmate in *Shoats* "apparently never argued that *Hewitt* procedures were inadequate" and only "contended that his continued long-term confinement in administrative segregation was based solely on his past criminal history." Opp. at 11. But the Third Circuit recognized that "Shoats claims [he was kept] in administrative custody in violation of his Fourteenth Amendment right to *procedural* due process," 213 F.3d at 140, and "reject[ed] Shoats' argument that he has been deprived of the *process* he is due under the Fourteenth Amendment," *id.* at 144. Thus, the court did address the what-process-is-due issue. And the court recognized as a matter of course that *Hewitt* governed that question. The court noted that future predictions alone, even if based on past events, could justify the placement at issue, so *Hewitt* process was enough. *Id.* at 146. And by not addressing *Sandin* in the what-process-is-due part of its opinion, after discussing it extensively in the liberty-interest part, the court recognized that *Sandin* had no effect on any question regarding whether *Hewitt* or *Wolff* process is required.

### C. Petitioners cited the right policy.

Respondents insist that Ohio attached the wrong version of the policy at issue, and that we are fighting over the wrong one, but it is Respondents who are mistaken. The version at issue is the one that Ohio adopted in January 2002, which is in the Petition Appendix. As Respondents properly note, Ohio issued this policy after the case began, but before trial, and the trial focused on this one. Opp. at 1. Respondents do not now argue that the earlier pre-January 2002 policy is at issue. Instead, they mistakenly argue that the policy now at issue is the *modified policy that resulted from the post-trial imposition of the court-ordered changes to the policy.* Respondents have it wrong.

First, Respondents misread the Sixth Circuit's statement that "it is the district court's ordered modifications to new 111-07, made after a bench trial, that are at issue." *Id.*, quoting Pet. App. 5a. In stating that the district court's *modifications* were at issue, the Sixth Circuit meant that the issue was whether those modifications really were constitutionally required, or whether the policy was acceptable without those changes. Second, Respondents' new suggestion—that the Sixth Circuit reviewed the post-district-court policy to see if *that* was good enough—simply makes no sense. Obviously, we want to restore the policy that we had before the courts imposed more rules on us; we do not seek to attack (or need to defend) the court-rewritten version. We did not obtain a stay pending these appeals, so we have had to live under the new court-ordered rules, which required issuing yet another policy to implement those rules. But we want to restore our own rules.

## CONCLUSION

For the above reasons, and those in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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November 22, 2004

(12)

Supreme Court, U.S.
FILED
JAN 2 6 2005
OFFICE OF THE CLERK

No. 04-495

# In The Supreme Court Of The United States

REGINALD WILKINSON, et al.,
*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,
*Respondents.*

*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: OCTOBER 8, 2003
CERTIORARI GRANTED: DECEMBER 10, 2004

No. 04-495

**In The Supreme Court Of The United States**

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REGINALD WILKINSON, et al.,

*Petitioners,*

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*Respondents.*

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*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

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PETITION FOR WRIT OF CERTIORARI FILED: OCTOBER 8, 2003
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# TABLE OF CONTENTS

Page

**Selected Docket Entries**

*Austin v. Wilkinson et al.*, No. 4:01-CV-01171-JG
(U. S. District Court for the Northern District of Ohio
(Youngstown)) ..... 1

*Austin v. Wilkinson,* No. 02-3429
(U. S. Court of Appeals for the Sixth Circuit)..... 7

*Austin v. Wilkinson*, No. 02-3816
(U. S. Court of Appeals for the Sixth Circuit)..... 9

**Regulations, Policies, and Publications**

Ohio Admin. Code § 5120-9-53
Joint Exhibit VII..... 11

Ohio Dep't of Rehabilitation and Correction
Policy 111-07 with Forms
(effective Mar. 1, 2002), ..... 15

Ohio Dep't of Rehabilitation and Correction
Policy 111-07 with Forms
(effective May 22, 2002),..... 70

Plaintiffs' Exhibit 3,
Ohio Dep't of Rehabilitation and Correction
Policy 501.36
(effective Dec. 22, 2000)..... 135

Chase Riveland, *Supermax Prisons:*
*Overview and General Considerations*
(U. S. Dep't of Justice, Nat'l Inst.
of Corrections 1999) ..... 158



Page

**Exhibits**

Plaintiffs' Exhibit 10 (partial),
Appx. B: Summary of Inmate Profiles
and Accompanying Tables..... 165

Austin Exhibit 5..... 169

Austin Exhibit 8..... 175

Benge Exhibit 9..... 177

Benge Exhibit 15..... 178

DeJarnette Exhibit 2..... 180

DeJarnette Exhibit 3..... 181

DeJarnette Exhibit 5..... 183

DeJarnette Exhibit 9..... 184

DeJarnette Exhibit 11..... 189

Gardner Exhibit 1A..... 192

Gardner Exhibit 1B..... 194

Gardner Exhibit 1C..... 196

Gardner Exhibit 3..... 197

Gardner Exhibit 5..... 200

Lane Exhibit 1..... 210

**Page**

Robb Exhibit 12.....212

Robb Exhibit 14.....213

Roe Exhibit 1.....215

Roe Exhibit 2.....217

Roe Exhibit 6.....227

Roe Exhibit 10.....230

Thompson Exhibit 4.....233

Thompson Exhibit 6.....236

Thompson Exhibit 7.....239

Tolliver Exhibit 9.....241

Tolliver Exhibit 4.....244

Affidavit of Mathew Meyer.....246

Deposition of Reginald Wilkinson,
Director of the Ohio Dep't of
Rehabilitation and Correction.....249

**Transcript Excerpts**
**U.S. District Court for the Northern District of Ohio**
**January 7-10, 2002 (Vols. 1-4)**

Testimony of James Fellner.....264

Testimony of Peter Davis.....273



**Page**

Testimony of Todd Ishee.....310, 316

Testimony of Bernard Ryznar.....312

Testimony of Chase Riveland.....364

Testimony of James Austin.....431

Testimony of Matt Meyer.....454

Testimony of Stephen Huffman.....457

Testimony of Terry Collins.....464

[The following reproduction includes
only selected docket entries.]

United States District Court
For The Northern District Of Ohio (Youngstown)
Civil Docket For Case #: 4:01-CV-01171-JG

Austin v. Wilkinson et al.

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DOCKET ENTRIES

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| Filing Date | # | Docket Text |
|---|---|---|
| 01/09/2001 | 1 | Complaint for Declaratory Judgment and Injunctive Relief. |
| | | * * * |
| 03/30/2001 | 17 | Answer to Complaint. |
| | | * * * |
| 04/09/2001 | 19 | First Amended Complaint Adding New Parties. |
| 04/09/2001 | 20 | First Amended Complaint Adding New Party. |
| | | * * * |
| 05/10/2001 | 27 | Answer to Amended Complaint |
| | | * * * |



| | | |
|---|---|---|
| 02/25/2002 | 227 | Opinion and Order signed by Judge James S. Gwin on 2/25/02 that the Court finds the plaintiff inmates have a liberty interest entitled to constitutional protection. Because of the length of placement in its severely restrictive conditions, incarceration at the OSP imposes an atypical and a significant hardship upon inmates. The defendants have violated the plaintiff class's right to due process by denying the plaintiffs adequate notice, adequate hearing, and sufficiently detailed decisions. Having found that the defendants violated, and will continue to violate, the plaintiffs' constitutionally protected liberty interest, the Court orders the parties to file, within fourteen days of the publication of this judgment, proposed injunctive orders, extending no further than necessary to correct the violation of the federal right set out in this opinion in a way that is the least intrusive means to correct the violation. |
| | | * * * |
| 03/26/2002 | 259 | Order signed by Judge James S. Gwin on 3/26/02 previously the Court held that the defendants violated the plaintiff class's right to due process by denying the plaintiffs adequate notice, adequate hearings, and sufficiently detailed decisions |

concerning their placement at the OSP. Because the defendants have violated the plaintiffs' constitutionally protected liberty interest, the Court orders the least intrusive means to correct the violation. The Court will retain jurisdiction over this matter for the purpose of enforcement. This injunction shall terminate in two years upon the motion of either party unless the Court finds that prospective relief is needed to correct an ongoing violation of a federal right.

| | | |
|---|---|---|
| 03/26/2002 | 260 | Judgment signed by Judge James S. Gwin on 3/26/02 that the Court has issued its injunctive order in the case. The defendants will submit proposed changes to Policy 111-07 in accordance with that order within thirty days for approval by the Court. This action is terminated under Rule 58 of the Federal Rules of Civil Procedure. |

* * *

| | | |
|---|---|---|
| 04/17/2002 | 268 | Notice of Appeal to the USCA for the 6th Circuit from opinion and judgment dated March 26, 2002 filed by all defendants. |

* * *

| | | |
|---|---|---|
| 05/15/2002 | 284 | Order signed by Judge James S. Gwin on 5/15/02 that having reviewed the defendants' proposed policy 111-07, |



the plaintiffs' response to the policy, and the defendants' reply, the Court adopts the defendants' 4/24/02 proposed policy with the changes contained within this order.

* * *

| | | |
|---|---|---|
| 07/12/2002 | 311 | Order signed by Judge James S. Gwin on 7/12/02 denying defendants' motion seeking partial relief from judgment. |

* * *

| | | |
|---|---|---|
| 07/12/2002 | 313 | Notice of Appeal to the USCA for the 6th Circuit from orders of May 15, 2002 (Doc. No. 284) and July 12, 2002 ( Doc. No. 311) filed by all defendants. |

* * *

| | | |
|---|---|---|
| 12/23/2002 | 358 | Motion for order to enforce Court's Orders of February 25, 2002, March 26, 2002, May 15, 2002, and July 12, 2002, filed by all plaintiffs. |

* * *

| | | |
|---|---|---|
| 05/15/2003 | 414 | Order signed on 5/15/03 by Judge James S. Gwin. The Court grants the plaintiffs' motion to enforce in part and denies it in part. The Court finds that the defendants have violated parts of the Court's prior orders but it denies the plaintiffs' request for |

further injunctive relief. Instead, it instructs the defendants to more rigorously observe the Court's Orders in all future reviews. Finally, because the Court modifies the Orders only to the extent necessary to maintain a status quo and because the Court denies the plaintiffs' request for further injunctive relief, the Court denies the defendants' contemporaneous motion to dismiss.

* * *

| | | |
|---|---|---|
| 06/10/2003 | 419 | Notice of Appeal (Filing Fee Not Paid) from order of May 15, 2003, filed by all defendants. |

* * *

| | | |
|---|---|---|
| 06/14/2004 | 453 | Information copy of opinion from the USCA for the Sixth Circuit: The judgment of the District Court is partially affirmed and partially reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion as to 268 Notice of Appeal (USCA# 02-3429) and 313 Notice of Appeal (USCA# 02-3816). |

* * *

| | | |
|---|---|---|
| 07/06/2004 | 459 | True copy of mandate from the USCA for the Sixth Circuit: Affirming in part, reversing in part the judgment of the District Court and |



remanding as to 268 Notice of Appeal (USCA# 02-3429) and 313 Notice of Appeal (USCA# 02-3816). Date issued as mandate 7/2/04, Costs: None (Related document 453).

* * *

| | | |
|---|---|---|
| 12/15/2004 | 520 | Letter from the Supreme Court of the United States dated 12/10/04 giving notice the petition for a writ of certiorari was granted. |

[The following reproduction includes only selected docket entries.]

GENERAL DOCKET
U. S. Court of Appeals for the Sixth Circuit

No. 02-3429

CHARLES E. AUSTIN, Plaintiff-Appellee

v.

REGINALD A. WILKINSON, Director, et al., Defendant-Appellant

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DOCKET ENTRIES

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| Date | Docket Text |
|---|---|
| 4/19/02 | Prisoner Case Docketed. |
| | * * * |
| 7/25/02 | ORDER filed to consolidate for briefing and submission cases 02-3429/3816. |
| | * * * |
| 10/30/03 | CAUSE ARGUED on 10/30/03. |
| | * * * |



| | |
|---|---|
| 6/10/04 | OPINION filed: AFFIRMED in part and REVERSED in part the district court's judgments, and REMANDED to the district court for further proceedings with this opinion. |
| 6/10/04 | JUDGMENT: AFFIRMED in part and REVERSED in part, and REMANDED. |
| 7/2/04 | MANDATE ISSUED with no cost taxed. |
| | * * * |
| 12/13/04 | U.S. Supreme Court letter filed granting petition for writ of certiorari [3072882-1] filed by Reginald Wilkinson, Reginald Wilkinson [02-3429, 02-3816] Supreme Court No. 04-495 in 02-3429, 02-3816. Filed in the Supreme Court on 12-10-04. |

[The following reproduction includes
only selected docket entries.]

GENERAL DOCKET
U. S. Court of Appeals for the Sixth Circuit

No. 02-3816

CHARLES E. AUSTIN,
Plaintiff-Appellee

v.

REGINALD A. WILKINSON,
Director, et al., Defendant-Appellant

---

DOCKET ENTRIES

---

| Date | Docket Text |
|---|---|
| 7/25/02 | Prisoner Case Docketed. |
| 7/25/02 | ORDER filed to consolidate for briefing and submission cases 02-3429/3816. |
| | * * * |
| 10/30/03 | CAUSE ARGUED on 10/30/03 |
| | * * * |
| 6/10/04 | OPINION filed: AFFIRMED in part and REVERSED in part the district court's |



| | |
|---|---|
| | judgments, and REMANDED to the district court for further proceedings with this opinion. |
| 6/10/04 | JUDGMENT: AFFIRMED in part and REVERSED in part, and REMANDED. |
| 7/2/04 | MANDATE ISSUED with no cost taxed. |
| | * * * |
| 12/13/04 | U.S. Supreme Court letter filed granting petition for writ of certiorari [3072882-1] filed by Reginald Wilkinson, Reginald Wilkinson [02-3429, 02-3816] Supreme Court No. 04-495 in 02-3429, 02-3816. Filed in the Supreme Court on 12-10-04. |

**Joint Exhibit VII**
**4:01cv071**

Ohio Department of Rehabilitation and Correction
ADMINISTRATIVE RULE

| | | |
|---|---|---|
| Institutions | 5120-9-53 | Classification and Reclassification of Inmates |

(A) Whenever an institution receives an inmate from the reception center, pursuant to this rule 5120-9-52 of the Administrative Code, his recommended security level and classification programs shall be reviewed at the termination of the institution's orientation program by the institutional classification committee. the institutional classification committee shall represent various disciplines, and shall be designated by the managing officer in consultation with the director or his designee.

(B) The inmate's security level status programming shall be implemented unless the institutional classification committee determines that modification is necessary. In recommending modification, the institutional classification committee shall demonstrate that this recommendation is based upon the criteria specified in this rule 5120-9-52 of the Administrative Code.

(C) No inmate's custody security level status as described in rule 5120-9-52 of the Administrative Code, shall be permanently changed except upon the convening, by the managing officer, of a meeting of the institution classification committee. Any recommended change must be based upon the criteria in rule 5120-9-52 of the Administrative code, and is subject to the approval of the bureau of examination and classification if an institutional transfer is recommended,



as set forth in rule 5120-9-21 of the Administrative Code.

(D) The institutional classification committee shall have jurisdiction over reclassification, supervision level placement review, intra-institutional or inter-institutional administrative classification recommendation, furlough and community release screening.

(E) At all institutional classification committee hearings, the committee shall:

(1) Review the inmate's supervision level status, considering all current data with respect to selected post-commitment criteria.

(2) Reassess the inmate's needs, evaluate placement and progress and recommend desirable modifications to the inmate within a reasonable and specified period of time.

(3) Review the inmate for release eligibility consideration, pursuant to rule 5120-:1-1-20 of the Administrative Code.

(4) Initiate or continue an appropriate plan of treatment.

(5) Register within the master record file, notes of observed improvement or deterioration of character of the inmate, the method of treatment employed, orders or alterations affecting his standing or situation, and subsequent facts or personal history which may be officially brought to the knowledge of departmental staff bearing upon the propriety of the ere lease or paroled of the prisoner.

(F) The institutional classification committee shall review the supervision level of all inmates at time intervals established by the committee, but no less than annually.

(G) Whenever a change in supervision level or a material change in program is undertaken, a conference between the inmate and at least one member of the institution classification committee shall be held. The inmate, at least FORTY-EIGHT hours prior to the conference, unless he waivers notice, shall be notified of the purpose of the conference, and that he has the right to meet with at least one member of the committee, to make a statement if he desires, and to submit written statements.

(H) After the institutional classification committee conference with the inmate, the committee shall make a written summary of the conference and register the summary, including the responses the inmate on the mast record file. This committee will then recommend, for the approval for the managing officer, whether or not a supervision level change is appropriate. The inmate shall be notified orally of the recommendation of the committee and of his right to appeal the recommendation to the managing officer or his designee.

(1) Any additional written reports which are to be filed shall be determined by statute, judicial order, administrative rule, and/or the director or his designee.

(2) Transfer to another institution or classification change prior to committee haring shall be in accordance with rule 5120-9-21 of the Administrative Code.

(I) The inmate may further appeal the decision to the:



(1) Bureau of examination and classification within five days after being notified of an adverse decision. The appeal must state in detail the reasons for the appeal.

(2) The decision of the bureau of examination and classification shall be final.

(3) Implementation of any decision shall not be stayed pending appeal.

Effective date: January 8, 1991
Certified: George Wilson
Date: December 27, 1990
Former Rule Number; 5120-9-53
Promulgated Under: 111.15
Statutory Authority: 5120-01; 5120-16; 5120.11
Prior Effective dates: 11/10/75; 1/1/83; 7/18/83; 9/4/84

STATE OF OHIO

(SEAL)

DEPARTMENT OF
REHABILITATION
AND CORRECTION

| SUBJECT: | PAGE 1 OF 12 |
|---|---|
| LEVEL 4 / LEVEL 5 CLASSIFICATION FOR MALE INMATES | SECTION: 111-<br>NUMBER: 07 |
| RULE/CODE REFERENCE: | SUPERCEDES:<br>111-07 DATED 01/28/99 |
| RELATED ACA STANDARDS | EFFECTIVE DATE:<br>March 1, 2002 |
| RELATED AUDIT STANDARDS: | APPROVED: January 3, 2002 |

I. AUTHORITY:

This policy is issued in compliance with Ohio Revised Code Section 5120.01 which delegates to the Director of the Ohio Department of Rehabilitation and Correction the authority to manage and direct the total operations of the Department and to establish such rules and regulations as he prescribes.

II. PURPOSE:

The purpose of this policy is to define the classification procedures for placing inmates in Level 4 and Level 5 security classifications.





III. APPLICABILITY:

This policy applies to all staff and male inmates involved in the classification process.

IV. DEFINITIONS:

Classification Level 4—A security level for inmates who are involved in, but not leading others to commit violent, disruptive, predatory or riotous actions, and/or a threat to the security of the institution as set forth in the established Level 4 criteria. This classification replaces the classification previously known as "maximum security." References to maximum security in the Administrative Code and other policies shall be construed as the equivalent of level 4.

Classification Level 5—A security level for inmates who commit or lead others to commit violent, disruptive, predatory, riotous actions, or who otherwise pose a serious threat to the security of the institution as set forth in the established Level 5 criteria. This classification replaces the classification previously known as "high maximum security." References to "high maximum security" in the Administrative Code and other policies shall be construed as the equivalent of "level 5."

Privilege Level B—The initial privilege level assigned to an inmate classified into Levels 4 or 5.

Privilege Level A—A less restrictive privilege level, which inmates may be placed into by the Privilege Level Review Committee, after a review of the inmate's status in Levels 4 or 5.

Seriously Mentally

Ill—Serious mental illness means a substantial disorder of thought or mood which significantly impairs judgement, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and is manifested by substantial pain or disability. Serious mental illness requires a mental health diagnosis, prognosis and treatment, as appropriate, by mental health staff.

V. POLICY:

It is the policy and objective of the classification level system to create a process for the classification of inmates according to their security risk. This process shall consider behavior and such other objective factors as are available and relevant when assessing an inmate's institutional security needs. Inmates shall be placed at the lowest level of security possible that is still sufficient to ensure the safety and security of persons, the institution and the community. Inmates shall be placed at institutions that are consistent with their security classification rating. Inmates who classified as level five and are determined to be seriously mentally ill shall not be housed at the Ohio State Penitentiary but shall be housed at another facility as determined by the Director.

VI. PROCEDURES:

A. Placement in Level 4 or 5 from Reception

Inmates may be placed at Level 4 or 5 from Reception, based upon the results of the scoring of the Security Designation Form by the Reception Coordinator, recommended by the Warden/Designee and approved by the Bureau of Classification. The Reception Coordinator shall use



the Security Designation Long Forms, referenced at the end of this directive.

B. Placement in Level 4:

The Warden, Deputy Warden, Major, Unit Management Administrator (UMA), Unit Manager, Rules Infraction Board (RIB), or Reception Coordinator may initiate placement into the Level 4 Classifications. If the Department has already made an initial assignment following reception, the person initiating the placement shall use the Supervision Review Forms, referenced at the end of this directive. Once initiated, the Warden/Designee shall establish a classification committee pursuant to rule 5120-9-53 of the Administrative Code to review the inmate's behavior and determine if the inmate meets one or more of the following Level 4 criteria:

1. The inmate has demonstrated physically assaultive and/or predatory behavior resulting in physical harm/injury to any person.
2. The nature of the inmate's behavior presents a current threat to the security and orderly operation of the institution and safety of others.
3. The inmate has planned or participated in a serious disturbance or riot.
4. The inmate has possessed major contraband which poses a threat or danger to the institution. This includes but is not limited to: weapons, drugs, escape contraband, large amounts of currency.
5. The inmate has been identified by the institution Security Threat Group Coordinat

or as an active member involved in disruptive security threat group behavior.

6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level 1 or 2 (or their equivalent, minimum or medium) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.
7. The inmate has established an inappropriate relationship with a staff member.
8. The inmate through repetitive and/or seriously disruptive behavior has demonstrated an inability to adjust to Level 3 as evidenced by repeated class II rule violations.

The classification committee shall review the completed Supervision Review Form and any relevant information. The inmate is to be served with a Notice of Hearing Form (Form DRC2598) 48 hours prior to the hearing, and afforded the opportunity to appear before the entire committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 4 placement.

The inmate will also be afforded the opportunity to submit a written statement to the committee. The classification committee shall determine whether the inmate has met one of the criteria above and whether the inmate should be placed in level 4. The classification committee shall make a recommendation accordingly.

The Classification committee shall forward its recommendation to



the Warden/Designee. The Warden/Designee shall review the Supervision Review Form and all other information presented, and approve or disapprove the recommendation. If the warden approves the recommendation for level 4, he or she shall submit the recommendation to the Bureau of Classification for final disposition. The inmate may file a formal objection to the recommendation of the classification committee and warden with the Bureau of Classification within fifteen days. The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a final decision.

C. Placement in Level 5:

Placement into the Level 5 classification may be initiated by the Warden, Deputy Warden, Major, UMA, Unit Manager, RIB or the Reception Coordinator. The person initiating the placement shall use the Security Designation Long Form, referenced at the end of this directive. Once initiated, the Warden/Designee shall establish a classification committee to review the inmate's behavior and determine if the inmate meets one or more of the following Level 5 criteria:

1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in either serious physical injury or death to any person, or in an attempt to sexually assault any person, or to cause serious physical injury or death to any person. An inmate has demonstrated such behavior when the inmate has:
   - Physically assaulted another resulting in serious physical harm;
   -

Assaulted or attempted to assault another with a deadly weapon

- Compelled or attempted to compel another to perform sexual acts; engage in sexual conduct or sexual contact; or to submit to sexual contact; all by force or threat of force;
- Compelled or coerced another, by force or the threat of serious physical harm or death, to provide anything of value, to perform any act, or to violate any rule.

2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.
3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.
4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. This includes but is not limited to:
   - Deadly weapons
   - Ammunition
   - Escape instruments
   - Drugs for distribution
5. The inmate has been identified by the institution Security Threat Group Coordinator as a leader, enforcer, or recruiter of a security threat group, which is actively



involved in violent or disruptive behavior.

6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four (or their equivalent, close or maximum) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.
7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution.
8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis.
9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

The classification committee shall review the completed Supervision Review Form and any other relevant information. The inmate is to be served with a Notice of Hearing (Form DRC2598) 48 hours prior to the hearing, and afforded the opportunity to appear before the entire committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 5 placement. The inmate will also be afforded the opportunity to submit a written statement to the committee. The classification committee shall document informati

on presented by staff and the inmate (Forms DRC2627 and DRC2628). The classification committee shall determine whether the inmate has met one of the criteria above and whether the inmate should be placed in level 5. The classification committee shall make a recommendation accordingly, which shall be documented on the Classification Committee Report (Forms DRC2637, DRC2638, DRC2639).

The classification committee shall forward its recommendation to the Warden/Designee. The Warden/Designee shall review the Supervision Review Form and all other information presented, and approve or disapprove the recommendation. If the Warden approves the recommendation, he or she shall submit the recommendation and the approval to the Bureau of Classification for final disposition.

The inmate shall be notified of the warden's approval of the recommendation and may file a formal objection to the recommendations of the classification committee and warden with the Bureau of Classification within fifteen days of the date he is served with the committee's recommendation and warden's action. The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a final decision.

No inmate will be placed in level 5 who is determined to be seriously mentally ill, pursuant to the procedures of the department's bureau of mental health; or whose medical needs are inconsistent with that assignment, pursuant to Policy Directive 320-15, "Medical Classification."



D. Placement in Level 5 from Level 4

A classification Committee shall review the inmate's behavior and determine if the inmate meets at least one of the criteria for Level 5.

If the inmate's repetitive and/or seriously disruptive behavior has demonstrated a chronic inability to adjust to level 4B, the documentation must clearly reflect this. The classification committee must ensure that the documentation includes any repeated class II rule violations, information and/or descriptions of the inmate's behavior and how the behavior disrupted the operation of the housing unit, facility or its operation. For example:

- List any rule violations with dispositions and the dates of any violations within the previous twelve months.
- Detail the number of times it was necessary to use force to restrain or control the inmate.
- List the instances of disruptions to meal, recreation, shower or scheduled activities, etc.
- Detail the impact on other inmates, threats, disruptions, etc.

The classification committee shall complete the process as described in subsection C., above.

E. 30 Day Review/Orientation Process

Placement into Level 4 or Level 5 varies in length depending on the nature of the initiating incident, criteria for placement, and/or demonstrated behavior in assigned level. All inmates placed into these levels shall have a review of their classification level completed by an

assigned Unit staff member within 30 days of placement to determine if they have been properly classified. This review shall include a review of the inmate's file to ensure that proper documentation has been included detailing how/why the inmate has been classified into Level 4 or Level 5.

If the review finds that the inmate meets the appropriate criteria, Unit and/or programming staff will meet with the inmate to explain the classification and review processes and what the expectations are concerning his behavior, and appropriate program participation. This meeting will also afford the inmate the opportunity to request any needed assistance while assigned in the classification level. Staff will advise the inmate whether release to a general population institution in three years or less appears reasonably possible.

If the review finds that the inmate does not meet the Level 4 or Level 5 criteria, the reviewing staff member shall forward a written recommendation through the Deputy Warden of Operations, to the Warden recommending that the inmate be transferred to an appropriate institution. The reasons for the recommendation must be listed to reflect why the inmate is not appropriate for Level 4 or Level 5 and is more appropriate for another level.

If the Warden concurs with the recommendation, the packet will then be forwarded, along with a newly completed Supervision Review Form, to the Bureau of Classification for appropriate action. If the Warden disagrees with the committee's recommendation, the inmate remains at his current status and this decision is not appeallable.



F. Privilege Level Review Process

Inmates placed into Level 4 or 5 will initially be assigned to privilege level B (5B or 4B). They will remain in this level until recommended for reduction by the Privilege Level Review Committee, and approved by the Warden/Designee. Reductions from Privilege Level B to A do not require the Bureau of Classification's approval.

However, a Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636) must be completed, approved at the institution and entered into the DOTS system when a privilege level changes.

The privilege level review process—not to be confused with a Supervision Review—weighs both known behavior and future risk levels. The information reviewed during the assessment will include, but is not limited to:

- Program Involvement
- Current privilege level
- Time served in current privilege level
- Total time spent in level 5 and/or level 4
- Time left to spend on current sentence
- Time since last incident that resulted in inmate being designated level 5 or 4
- Conduct Reports
- Reason for placement
- Behavior in the last five years—Prior to Level 4 or 5 classification
- Security level when placed
- Adjustment/behavior after placement
- Interaction with others (staff and/or inmates)
- The offender recognizes and acknowledges factors contributing to the commission of the placement

offense and nature
- Other Factors which indicate a risk of future violence

The committee will use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. The privilege level review will be in a narrative form to record the factors considered by the evaluating employee. The inmate will appear before the Privilege Level Review Committee to ensure that he has the opportunity to have input into the process and respond to questions the committee may have during the review. The Privilege Level Review Committee will consist of a Unit staff member, a Custody staff member, and a Warden's designee. They may consult with any other staff person (Mental Health, Medical, Executive Staff, etc.) during the course of the review process.

G. Privilege Level Review for Level 4

Inmates placed in level 4 shall receive privilege level reviews during the time between annual supervision reviews. The annual supervision review procedures are



more fully described below. The provisions of this section pertain only to privilege levels within the assigned security level.

Privilege level 4B is an entry level privilege status. Placement in 4B is for an indeterminate period. Inmates classified into Level 4B shall have an assessment completed every six months. Inmates who are in privilege level 4B and have been reviewed pursuant to this subsection may be placed in privilege level 4A.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express his objections and explain his current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his eligibility for reduction. The first assessment will take place six months after the initial placement, and will continue every six months thereafter.

The Privilege Level Review Committee will make a recommendation to the Warden/Designee to either continue the inmate in 4B or reduce him to 4A, supported by a written rationale. The Warden/Designee shall then render a decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.

H. Privilege Level Review for Level 5

Inmates placed in level 5 shall receive level reviews during the time between annual supervision reviews. The annual supervision procedures are more fully described below. The provisions of this section pertain only to privilege levels within the assigned security level. Inmates classified into Level 5B shall have an assessment completed every three months; inmates classified as Level 5A shall have an assessment completed every six months.

Placement in Level 5 is for an indeterminate period. Privilege level 5B is an entry level privilege status. Inmates who are in privilege level 5B and have been reviewed pursuant to this subsection may be placed in privilege level 5A.

The Privilege Level Review Committee will consist of three members, designated by the Warden/Designee, such as the inmate's Unit Manager, Case Manager (to comment on educational programming, and other programming), Mental Health staff, and/or a custody staff person.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express his objections and explain his current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his eligibility for reduction. The first review for 5A inmates will take place six months after the initial placement, and will continue every six months thereafter. The first review for 5B inmates will take place three months after the initial placement, and will



continue every three months thereafter.

At the annual (one-year) review a Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636) will be completed — regardless of the recommendation — affording the inmate the normal classification review and appeals process.

The Review Committee will make a recommendation to the Warden/Designee to either continue the inmate in 5B, or to reduce him to 5A, supported by a written rationale. The Warden/Designee shall then render a final decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.

I. Annual Supervision Review:

All Level 4 and Level 5 inmates will have supervision reviews completed at least annually. The classification Committee shall consist of three members, which may include the Deputy Warden of Operations/Designee, the Unit Management Administrator, a Unit Manager, a Case Manager and/or other Unit Staff member and may include a Mental Health staff. All annual reviews must include a Director's designee to review all pertinent information and make a recommendation.

The inmate is to be served with a Notice of Hearing 48 hours prior to the hearing, and afforded the opportunity to appear before the entire

committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 4 or 5 placement. The inmate will be afforded the opportunity to submit a written statement to the committee. The committee shall make a comprehensive review of the inmate's institutional adjustment and behavior, including his behavior since placement in level 5 in order to make an assessment of the risk to safety and security posed by such an inmate.

This committee shall review the completed Privilege/ Security Level Review, Level 5B, 5A & 4B Form (DRC2634, DRC2636), and will take into consideration at a minimum the following information:

- Reason for placement in Level 4 or 5 and relevant circumstances;
- Conduct Reports;
- Current privilege level;
- Time served in current privilege level;
- Total time spent in level 5 and/or level 4;
- Time left to spend on current sentence;
- Time since last incident that resulted in inmate being designated level 5 or 4;
- Program Involvement;
- Behavior in the last five years, including prior to Level 4 or 5 classification;
- Security level prior to placement;
- Adjustment/behavior after placement;
- Factors which indicate a risk of future violence;
- Interaction with others (staff and/or inmates);
- Recognition and acknowledgment of the factors contributing to the commission of the placement offense and nature;
- The findings and recommendations of the previous assessment committees;
- Previous review committees;
- The findings and recommendations of all assessment committees subsequent



to the placement in level 4 or level 5;

- The findings and recommendations of all supervision review committees subsequent to placement in level 4 or level 5;

The committee will use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. The classification committee shall review the completed Privilege / Security Level Review, Level 5B, 5A & 4B Form and any other relevant information. The committee shall review and evaluate the factors listed above, the circumstances underlying the placement in Level 4 or 5, the reasons for initial placement, the inmate's subsequent actions and his demonstrated attitude. The committee shall determine whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security, within their professional correctional judgment. The committee shall make a recommendation to reduce or continue the inmate's security level accordingly. The committee shall identify the basis for its decision and the factors relied upon. If the committee believes the inmate presents a threat to security of a general population institution, the committee shall document their conclusions as to the inmate's risk and their reasons.

The classification committee shall forward its recommendation to the Warden/Designee. The Warden/Designee shall review the Privilege / Security Level Review, Level 5B, 5A & 4B Form and all other information presented, and approve or disapprove the recommendation. If the warden approves the recommendation, he or she shall submit the recommendation and the approval to the Bureau of Classification for final disposition. The inmate shall be notified of the warden's approval of the recommendation and may file a formal objection to the recommendations of the classification committee and warden with the Bureau of Classification within fifteen

days of the date he is served with the committee's recommendation and warden's action.

The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a decision.

Security Designation Long Form: Form Nos. DRC2568, DRC2630, DRC2569
Supervision Review Forms: DRC2098, DRC2094, DRC2629, DRC2338
Notice of Hearing Form: DRC2598
Information Presented by the Inmate: DRC2627
Information Presented by Staff: DRC2628).
Classification Committee Report Level 5 Placement, DRC2637, DRC2638, DRC2639
Privilege / Security Level Review, Level 5B, 5A & 4B Form (Form DRC2634, DRC2636)

## RECOMMENDED PRIVILEGE LEVELS FOR LEVELS 5 AND 4:

| | Level 5B | Level 5A | Level 4B | Level 4A |
|---|---|---|---|---|
| Clothing | 3 State Issue Uniforms | 3 State Issue Uniforms | 3 State Issue Uniforms | 3 State Issue Uniforms |
| Privilege Level Review | 3 Months | 6 Months | 6 Months | N/A |
| Classification Status Review | Annually | Annually | Annually | Annually |
| Phone Calls | One ten minute call per month. All others only by request of Attorney of Record or confirmed serious illness or death in the family | Two ten minute calls per month. All others only by Request of Attorney of Record or confirmed serious illness or death in the family. (Warden's Discretion) | One ten minute call per week. All others only by request of Attorney of Record or confirmed serious illness or death in the family (Warden's Discretion) | 2 times per day |

| | | | | |
|---|---|---|---|---|
| | (Warden's Discretion) | | | |
| Recreation | 5 one-hour periods per week, inside or outside recreation areas. | 5 one-hour periods per week; inside or outside recreation areas. Congregate recreation opportunity with at least one other inmate. | 5 one-hour periods per week; inside or outside recreation pods. Congregate recreation with at least one other inmate. | Seven 1- ½ hour periods per week |
| Shaving | 3 times per week | 3 times per week | 5 times per week | Any-time during the day. |
| Shower | 5 times per week | 5 times per week | 5 times per week | Twice per day. |
| TV | State Issued or purchase from commissary. Programming only. | State Issued or purchase from commissary Programming and Network. | Network and Institutional programming provided on range TV. Movie rentals on weekends and holidays. | May have personal TV |
| Walkman | None | Walkman w/ AM/FM w/cassette player. No | Walkman/Cassette AM/ FM w/cassette player. | Commissary Purchase or |

| | | | | |
|---|---|---|---|---|
| | | cassettes permitted. Battery operated. | Battery operated. Five (5) cassettes permitted. | Approved vendor |
| Visits | Non-Contact, 2 visits per month, per visitor for up to 2.5 hours; Attorney of Record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 3.5 hours, Attorney of Record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 4 hours, Attorney of Record, Clergy of Record. | Contact, 2 visits per month per visitor for up to 7 hours. |
| Library/ Legal Service Program-ming | Library: 3 paper-back books Legal: Per kite to Paralegal. Broadcast over TVs provided in each cell Small group program-ming in program booths | Library: 4 paperback books Legal: Per kite to Paralegal. Broadcast over TVs provided in each cell Small group programming in program booths | Library: 5 paperback books Legal: Per kite to paralegal. Broadcast over TVs provided on range. Small group counseling, no more than four inmates. | Minimum 4 1/2 hours per week. Broadcast over TVs; Small group counseling. |

| | | | | |
|---|---|---|---|---|
| Commissary Spending Limit Twice Per Month | $30.00 | $50.00 | $70.00 | $100. |

SECURITY DESIGNATION (LONG FORM-PAGE 1)
DEPARTMENT OF REHABILITATION AND CORRECTION
STATE OF OHIO

Number: # _____ - _____
Name: _____
Date of Birth: _____
(month) (day) (year)

Date of Review: _____
(mo) (day) (yr.)

Reviewer: _____
Institution: _____

| RACE: | SEX: | HISPANIC: |
|---|---|---|
| White ☐ | Male ☐ | Yes ☐ |
| Black ☐ | Female ☐ | No ☐ |
| Other ☐ | | |

Mental Health Level: _____ Medical Level: _____
Date of Earliest Possible Parole Hearings/
EDS/Stated Term: _____ Total Number of Felony Incarcerations: _____
Date of Last Prison Release: _____ PSI/OBI Present Yes ☐ No ☐
Committed for DUI: ☐ Technical Violator under Senate Bill 2: ☐ Sex Offender: ☐
Current Crime: _____ Felony Level: _____

| | SECTION A | WEIGHT | SCORE |
|---|---|---|---|
| Month/Yr | 1. AGE AT CURRENT COMMITMENT | | |
| Date Scoring __ | 33 years and older | 0 | |
| Date Birth __ | 25 to 32 years older | 1 | ☐ |
| Age ___ | 24 years and younger | 2 | |
| | 2. SEVERITY OF CURRENT OFFENSE | | |
| | Low Severity | 0 | |
| | Moderate Severity | 1 | ☐ |
| | High Severity | 2 | |
| | Greatest Severity | 4 | |
| | 3. SECURITY LEVEL LAST ADULT PRISON RELEASE | | |
| | No prior prison commitments | 0 | |
| | Released from Min. Security/Level 1 or other State | 1 | |
| | Released from Med Security Level 2 or Higher | 2 | |
| | 4. MOST RECENT VIOLENCE INDICATOR (DO NOT include current offense) | | |

| | | | |
|---|---|---|---|
| | No violence last 5 years | 0 | |
| | Violent conviction last 5 years | 1 | ☐ |
| | Violent conviction as a Juvenile last 5 years | 2 | |
| | 5. PRE-PRISON GANG MEMBER INDICATOR | | |
| | No | 0 | ☐ |
| | Yes _____ | 2 | |
| | 6. ESCAPE PAST/PRESENT | | |
| | No Escapes | 0 | |
| | Non-Perimeter Escape More than 1 Year | 1 | |
| | Non-Perimeter Escape within Last Year | 2 | |
| | Perimeter/Violent Escape 5 or More Years | 3 | |
| | Perimeter/Violent Escape Less than 5 Years | 4 | |
| | | TOTAL SCORE: | |

| | | | |
|---|---|---|---|
| 0-3 POINTS | 4-5 POINTS | 6-8 POINTS | 9-15 POINTS |
| LEVEL 1 | LEVEL 2 | LEVEL 3 | LEVEL 4 |

DRC 2568 (Rev 01/02

SECURITY DESIGNATION FORM(LONG FORM PAGE 2)
SECTION B OVERRIDES
AND RECOMMENDATIONS

Number: # _____ - _____

Name: _____
(last) (first)

1. Check all the Special Management Concerns which apply to this inmate for purposes of Overriding

Non-Discretionary Override

Conviction for Murder or Agg. Murder*
Prior Escape*
Other: (specify)

_____

*Exclude from Level 1 Custody

Discretionary Override

Prior Adjustment
Time to Earliest Hearing/Stated Term
Violence Threat
Notoriety of Case
Felony Detainer
Time Since Prior Incarceration
Sex Offender
Other: (specify) _____

**Discretionary Override For Level 4 when scored on page 1 of this form as level 1, 2 or 3:**

☐ Demonstrated physically assaultive and/or predatory behavior resulting in physical harm/injury to any person.

- ☐ Nature of behavior presents a current threat to the security and orderly operation of the institution and safety of others.
- ☐ Planned or participated in a serious disturbance or riot.
- ☐ Possessed major contraband which poses a threat or danger to the institution. Includes but is not limited to: weapons, drugs, escape contraband, large amounts of currency.
- ☐ Identified by the institution Security threat Group Coordinator as an active member involved in disruptive security threat group behavior.
- ☐ Escaped, attempted to escape or committed acts to facilitate an escape from a minimum or medium security facility or while under supervision outside of the facility, resulting in physical harm to others or caused serious destruction to the physical plan.
- ☐ Established an inappropriate relationship with a staff member.
- ☐ Through repetitive and/or seriously disruptive behavior demonstrated an inability to adjust to Level 3 as evidenced by repeated class II rule violations.

Discretionary Override For Level 5 when scored on page 1 of this form as level 1, 2, 3 or 4:

- ☐ Physically assaulted another resulting in serious physical harm.
- ☐ Assaulted or attempted to assault another with a deadly weapon
- ☐ By force or threat of force compelled or attempted to compel another to perform sexual acts; engage in sexual conduct or sexual contact.
- ☐ By force or threat of serious physical harm or death compelled or coerced another to provide anything of value, to perform any act, or to violate any rule.

- ☐ Nature of the inmate's dangerous criminal conduct presents a current threat to the security and orderly operation of the institution and to the safety of others.
- ☐ Lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.
- ☐ Conspired or attempted to convey, introduce or possess major contraband which posses a serious threat or danger to the security of the institution. Includes, but not limited to: __Deadly weapons, ammunition, escape instruments and drugs for distributions.
- ☐ Identified by the Institution security Threat Group Coordinator as a leader, enforcer or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.
- ☐ Escaped, attempted to escape or committed acts to facilitate an escape from a level 3, 4 or 5 facility or while under supervision outside the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plan.
- ☐ Has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution.
- ☐ Knowingly engaged in a pattern of behavior, which poses an unreasonable risk of harm to others

DRC2630 (Rev 01/02) Distribution: White–Record Office Canary–Bureau of Classification Pink–Unit File
ACA 4283

SECURITY DESIGNATION FORM (LONG FORM PAGE 3) Number: # _____-_____
SECTION B OVERRIDES AND RECOMMENDATIONS Name: _____
(last) (first)

2. Override of Security Level is Recommended

☐ Yes
☐ No

If yes, give rationale (required): _____

3. Recommended Custody Level and Placement Considerations:

Placement Consideration

☐ Bind-over under age 18
☐ Mental Health needs _____ level
☐ Medical needs _____ level
☐ Separations
☐ Special Education
☐ Required S.O.R.R.C.
☐ MRDD Program
☐ Older Offender
☐ Eligible for IPP

Recommended Security Level (Check one)

☐ Level 1
☐ Level 2
☐ Level 3
☐ Level 4
☐ Level 5

☐ Placement in DUI Camp
☐ Vocational Education needs
☐ Chemical Dependency

| Classification Specialist Signature | Date: |
|---|---|
| | |

SECTION C Bureau of Classification

1. Final Security Level
   ☐ Level 1 ☐ Level 3 ☐ Level 5
   ☐ Level 2 ☐ Level 4
   Rationale: _____
2. Institutional Assignment: _____

| Date Assigned Bureau of Classification: | Initials: |
|---|---|
| | |

DRC2569 (Rev 01/02) Distribution: White–Record Office Canary–Bureau of Classification Pink–Unit File
ACA 4283

SUPERVISION REVIEW – PAGE 1
DEPARTMENT OF REHABILITATION AND CORRECTION
STATE OF OHIO

Number: # _____ - _____
Name: _____
(last)(first)(middle)
Date of Birth: _____
(month)(day)(year)

Date of Review: _____
Reviewer: _____
Institution: _____

RACE: SEX: HISPANIC:
White ☐ Male ☐ Yes ☐
Black ☐ Female ☐ No ☐
Other ☐

Offense: _____

EDS/PBD/EST (Release Date):_____

Present Security Status:

Minimum Level 1 ☐ Medium ☐ High Close ☐ High Maximum ☐

Minimum Level 2 ☐ Close: ☐ Maximum ☐

Date of Last Review: _____

| Section IA | UNFAVORABLE BEHAVIOR | WEIGHT | SCORE |
|---|---|---|---|
| 1. | FINDING BY RULES INFRACTION BOARD (in the last 12 months) | | |
| | Not Heard by RIB/Found Not Guilty | 0 | ___ |
| | Found Guilty by RIB | 2 | |
| 2. | ADMINISTRATIVE/LOCAL CONTROL PLACEMENTS (in the last 12 months) | | |
| | None | 0 | ___ |
| | One or More | 3 | |
| 3. | MOST RECENT VIOLENCE INDICATOR (last 5 years) (Includes pre-prison, current offense, institutional violence) | | |
| | No Violence in Last 60 Months | 0 | |
| | Violent Conviction/Infraction Within Past 25-60 Months | 1 | ___ |
| | Violent Conviction/Infraction Within Past 24 Months | 2 | |

| | | | |
|---|---|---|---|
| 4. | FREQUENCY OF GUILTY CLASS II DISCIPLINARY REPORTS (in the last 12 months) | | |
| | None | 0 | ____ |
| | 1 – 2 | 1 | |
| | 3 – 5 | 2 | |
| | 6 or More | 3 | |
| | SECTION I A SUBTOTAL SCORE (Items 1 - 4) | | ____ |

| Section I B | STABILITY FACTORS | WEIGHT | SCORE |
|---|---|---|---|
| 5. | EDUCATIONAL ATTAINMENT (pre-prison and during incarceration) | | |
| | High School Diploma/GED/Higher Education | -1 | ____ |
| | Less Than High School Equivalency | 0 | |
| 6. | INSTITUTIONAL JOB PERFORMANCE (in the last 12 months) | | |
| | No Job Removal/Removed for Other Reasons | -1 | ____ |
| | Removed for Discipline (Including Non-Job Related Behavior) or Indication of Poor Job Performance | 0 | |

| | | | |
|---|---|---|---|
| 7. | AGE AT THIS REVIEW | | |
| | Age 40 or Older | -1 | ____ |
| | Age 39 or Younger | 0 | |

SECTION I B SUBTOTAL SCORE (Items 5-7) ____

---

TOTAL SCORE (Items 1-7) COMBINED SUBTOTALS: ____

---

| (-3- -1 POINTS) | (0 – 4 POINTS) | (5 – 10 POINTS) |
|---|---|---|
| Consider Supervision Decrease | Consider Present Supervision | Consider Supervision Increase |

Supervision Review – page 2
SECTION II (Overrides and Recommendations)

Number:# _____ - _____
Name: _____
(last) (first)

1. Committee Options:

Offense:_____ E.D.S./P.B.D./E.S.T. (Release Date):_____

| Score Indicates Considering Supervision Decrease (-3 - -1) | Score Indicates Considering Present Supervision (0 – 4) | Score Indicates Considering Supervision Increase (5 – 10) |
|---|---|---|
| a. Agree: Decrease One Level ☐ | a. Agree: Continuation ☐ | a. Agree: Increase One Level ☐ |
| b. Disagree: Continue Present Level: ☐ | b. Disagree: Decrease One Level ☐ Increase One Level ☐ | b. Disagree: Continue Present Level ☐ |

2. Check (√) all the Special Management Concerns which Apply to this Inmate for Purposes of Overriding Scored Level:

Level 1A Non-Discretionary Overrides

- ☐ Sex Offender
- ☐ Kidnapping or abduction offense
- ☐ High notoriety case inmate

Level 1B Non-Discretionary Overrides

- ☐ Any felony for causing death of a law enforcement officer or another person while incarcerated.
- ☐ Convicted of any capital offense, including former death row inmates.
- ☐ Documented history of escape.
- ☐ Medium security inmate serving indefinite sentence for an F1 or F2 and has not had statutory first parole board hearing.

Discretionary Override For Level 4

Discretionary Overrides

- ☐ Time left to serve
- ☐ Severity of current offense
- ☐ Extensive criminal history
- ☐ Good conduct
- ☐ Other _____
- ☐ Other _____
- ☐ Other _____

- ☐ Demonstrated physically assaultive and/or predatory behavior resulting in physical harm/injury to any person.
- ☐ Nature of behavior presents a current threat to the security and orderly operation of the institution and safety of others.
- ☐ Planned or participated in a serious disturbance or riot.
- ☐ Possessed major contraband which poses a threat or danger to the institution. Includes but is not limited to: weapons, drugs, escape contraband, large amounts of currency.
- ☐ Identified by the institutions Security Threat Group Coordinator as an active member involved in disruptive security threat group behavior.
- ☐ Escaped, attempted to escape or committed acts to facilitate an escape from a minimum/Level 1 or medium/Level 2 security facility or while under supervision outside of the facility, resulting in physical harm to others or caused serious destruction to the physical plant.
- ☐ Established an inappropriate relationship with a staff member.

Through repetitive and/or seriously disruptive behavior demonstrated an inability to adjust to Level 3 as evidenced by repeated class II rule violations.

Supervision Review – page 3
SECTION II (Overrides and Recommendations)

Number: #_____-_____
Name: _____
(Last) (First)

Discretionary Override For Level 5

- ☐ Physically assaulted another resulting in serious physical harm.
- ☐ Assaulted or attempted to assault another with a deadly weapon.
- ☐ By force or threat of force compelled or attempted to compel another to perform sexual acts; engage in sexual conductor sexual contact.
- ☐ By force or threat of serious physical harm or death compelled or coerced another to provide anything of value, to perform any act, or to violate any rule.
- ☐ Nature of the inmate's dangerous criminal conduct presents a current threat to the security and orderly operation of the institution and to the safety of others.
- ☐ Lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.
- ☐ Conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. Includes, but not limited to: Deadly weapons, ammunition, escape instruments and drugs for distribution.
- ☐ Identified by the Institutions Security Threat Group Coordinator as a leader, enforcer or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.

- ☐ Escaped, attempted to escape or committed acts to facilitate an escape from a level 3, 4 or 5 facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.
- ☐ Has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution.
- ☐ Knowingly engaged in a pattern of behavior, which poses an unreasonable risk of harm to others.
- ☐ Through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

---

3. Override of Review Score is Recommended: ☐ Yes ☐ No

If yes, give rationale (required): _____

_____

_____

---

4. Recommended Placement (check appropriate box)

| | | | |
|---|---|---|---|
| ☐ Level 1A | ☐ Level 2 | ☐ Level 4A | ☐ Level 5A |
| ☐ Level 1B | ☐ Level 3 | ☐ Level 4B | ☐ Level 5B |

| Chairperson (Signature): | Date: |
|---|---|
| | |

5. Warden's Action: Approve: ☐ Disapprove: ☐

6. Warden's Comments: _____

| Warden (Signature): | Date: |
|---|---|
| | |

DRC 2629 (REV 01/02)

Supervision Review – page 4
SECTION II (Overrides and Recommendations)

Number: # _____ - _____

Name: _____
(last) (first)

8. Assignment Requires Transfer: Yes ☐ No ☐

9. Mental Health Needs _____ Level: Yes ☐ No ☐

10. Medical Needs _____ Level: Yes ☐ No ☐

Offense: _____

E.D.S./P.B.D./E.S.T.(Release Date)
_____

11. Date of Next Review (month & year)

SECTION III (Bureau of Classification)

12. Bureau of Classification Action: Approve: ☐ Disapprove: ☐

13. Final Placement (check appropriate box):

| | | | |
|---|---|---|---|
| ☐ Level 1A | ☐ Level 2 | ☐ Level 4A | ☐ Level 5A |
| ☐ Level 1B | ☐ Level 3 | ☐ Level 4B | ☐ Level 5B |

14. Institutional Placement:

15. Bureau of Classification Rationale (required): _____

16.

| Date Assigned by Bureau of Classification: | Initials: |
|---|---|

DRC 2338 (REV 01/02)

# NOTICE OF HEARING

*Level 5 Security Placement*

| Inmate Name: | Number |
|---|---|
| Lock: | Institution: |

You have been referred to the Classification Committee for a hearing to determine whether you should be recommended for Level 5 placement at the Ohio State Penitentiary. The hearing will be held on _____. Pursuant to Ohio Administrative Code §5120-9-53, you will be given the opportunity to speak with at least one member if the committee regarding the proposed placement, to make a statement, and to submit written statements.

You were referred to the Classification Committee for the following reasons(s):

_____

| Staff Signature: |
|---|

A copy of this Notice of Hearing was served upon the above-named inmate on:

| Date: | Time: |
|---|---|

☐ I wish to waive my right to forty-eight (48) hours between the time I received a copy of this notice and the time I have my hearing.

☐ I wish to waive my right to attend the hearing.

| Inmate Signature: | Number: |
|---|---|

DRC2598 (Rev 01/02)

Summary Of Inmate's Information
*Level 5 Security Placement*

| Inmate Name: | Number: |
|---|---|
| Lock: | Institution: |

The above-named inmate was referred to the Classification Committee for a hearing to determine whether he should be placed in Level 5 at the Ohio State Penitentiary. Following is a summary of the inmate's information as presented to the committee.

| Staff Signature: | Date: |
|---|---|

DRC2627 (12/01)



Summary Of Staff's Information
*Level 5 Security Placement*

| Inmate Name: | Number: |
|---|---|
| Lock: | Institution: |

The above-named inmate was referred to the Classification Committee for a hearing to determine whether he should be placed in Level 5 at the Ohio State Penitentiary. Following is a summary of the staff's information as presented to the committee.

| Staff Signature: | Date: |
|---|---|

DRC2628 (12/01)

## CLASSIFICATION COMMITTEE REPORT
*Level 5 Security Placement*

| Inmate Name: | Number: |
|---|---|
| Lock: | Institution: |

The above-named inmate was referred to the Classification Committee for a hearing to determine whether he should be recommended for Level 5 placement at Ohio State Penitentiary. The reasons for the referral are:

_____

_____

_____

_____

The hearing was held on: _____

The committee members were _____

_____

_____

The inmate ☐ was present; ☐ was not present for the following reason(s):

_____

_____

The inmate ☐ submitted; ☐ did not submit a written statement to the committee.

*A summary of the information presented by the inmate is attached.*
*A summary of the information presented by the prison staff is attached.*



The Classification Committee ☐ recommends; ☐ does not recommend that this inmate be classified as Level 5 and transferred to the Ohio State Penitentiary. (If Level 5 is recommended, the following two sections must be completed.)

Demonstrated Behavior:
This inmate's behavior meets the criteria of the DRC Policy 111-07 (identify which criteria is applicable):

☐ 1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in serious physical injury or death, or an attempt to sexually assault any person, or to cause serious physical injury or death to any person.

☐ 2. The nature of the inmate's dangerous criminal conduct presents a current threat to the security and orderly operation of the institution and the safety of others.

☐ 3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.

DRC 2637 (Rev 01/02)

Classification Committee Report Inmate Last Name:
Level 5 Security Placement, Page 2 Number:

Demonstrated Behavior Continued:

☐ 4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution.

☐ 5. The inmate has been identified a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior

☐ 6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a Level 3 or 4 security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.

☐ 7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution.

☐ 8. The inmate knowingly engaged in a pattern of behavior, which poses an unreasonable risk of harm to others.

☐ 9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to Level 4B as evidenced by repeated class II rule violations.
Act(s) committed by the inmate which meets the criteria:

_____

_____



Nature of the Threat Presented:

Describe the nature of the threat the inmate presents and the committee's reasons for the recommendation:

_____

| Committee Member: | Committee Member: |
|---|---|
| Committee Member: | Date: |

Warden's Action: ☐ Approve ☐ Disapprove

Warden's Comments: _____

_____

_____

| Warden: | Date: |
|---|---|

DISTRIBUTION: WHITE – Records CANARY – Unit File
PINK – Inmate GOLDENROD – Regional Director (when appropriate)
DRC 2638 (Rev. 01/02) ACA 4282, 4288, 4289

Classification Committee Report Inmate Last Name:
Level 5 Security Placement, Page 3 Number:

A copy of the committee's recommendation and warden's action was served upon the above-named inmate on:

| Date: | Time: | Staff Signature: |
|---|---|---|
| | | |

If the Warden approves the recommendation, he or she shall submit the recommendation and the approval to the Bureau of Classification for final disposition. The inmate shall be notified of the warden's approval of the recommendation and may file a form objection to the recommendations of the classification committee and warden with the Bureau of Classification within fifteen days of the date he is served with the committee's recommendation and warden's action.

Chief, Bureau of Classification Action:
☐ Approve ☐ Disapprove

Chief, Bureau of Classification Comments:

_____

_____

| Chief: | Date: |
|---|---|
| | |

DISTRIBUTION: WHITE - Records CANARY – Unit File PINK – Inmate GOLDENROD – Regional Director (when appropriate)
DRC 2639 (Rev 01/02) ACA 4282, 4288, 4289



Privilege/Security Level Review
(5B, 5A, 4B) ☐ Annual Supervision Review

| Name: | Number: | Institution: | Lock: | Date: |
|---|---|---|---|---|
| | | | | |

| Current Privilege Level: | Date Placed in Current Privilege Level: | Date of Last Review: |
|---|---|---|
| | | |

Time To Earliest Possible Release:
☐EDS ☐PRD ☐POA ☐FHD ☐Other _____
☐More than Ten Years ☐Six To Ten Years
☐Three To Five Years ☐Less Than Two Years

Original Placement Offense:

_____

| Basis for Admission to Level 5 Or Level 4 | Current Conduct Behavior Level 5 Or Level 4 |
|---|---|
| ☐1. STG or more than one incident of violence toward staff.<br>☐ 2. Single incident of violence toward staff.<br>☐ 3. More than one incident of violence toward inmate(s).<br>☐4. Single incident of violence toward an inmate<br>☐ 5. More than one non-violent major contraband incident.<br>☐6. Single non-violent major contraband incident.<br>☐7. Other: | ☐1. Poor – Continues to receive Class II Conduct Reports on a periodic basis.<br>☐2. Average – Occasional Class II, but no aggressive/ assaultive behavior.<br>☐ 3. Good – Occasional Class III Conduct Reports, but no Class II conduct Reports.<br>☐ 4. Excellent – No incidents or Conduct Reports. |

Time since Last Incident That Resulted In Designation As Level 5 or Level 4:

☐Past Year ☐One-Three Years ☐Four-Five Years
☐More than 5 Years Ago

| | Post Placement | After the Last Review |
|---|---|---|
| Class II Conduct Reports: | | |
| Class III Conduct Reports: | | |

Program Involvement:

☐ No Participation in Programs Required by Program Plan.
☐ Enrolled but had Not Completed Programs.
☐ Participated and Completed Programs Required by Program Plan

1. Unit: _____

_____

2. Education: _____

_____

3. Recovery Services: _____

_____

4. Mental Health: _____

_____

5. Other: _____

_____

DRC2634 (01/02) DISTRIBUTION: WHITE – Records



CANARY – Unit File PINK –Inmate GOLDENROD – Regional Director (when appropriate)

ACA 4282, 4284, 4288

Privilege/Security Level Review- page 2
*(5B, 5A, 4B)*

| Inmate Name: |
|---|
| Number: |

Interaction With Others:
1. Staff: ☐Good ☐Average ☐Poor
Comments: _____

2. Inmates: ☐Good ☐Average ☐Poor
Comments: _____

Inmate Comments At Review Hearing: _____

_____

Staff Comments At Review Hearing: _____

_____

Committee Recommendation:

| | | | |
|---|---|---|---|
| Retain At Current Level: | ☐ | ☐ | ☐ |
| Decrease One Level: | ☐ | ☐ | ☐ |
| Increase One Level: | ☐ | ☐ | ☐ |
| Recommend Security Review: | ☐ | ☐ | ☐ |

Staff Signatures: _____

Warden/Designee's Signature/Action:
☐Approve ☐Deny Warden/Designee's Signature:
Annual Supervision Reviews ONLY:
☐Approve ☐ ☐Deny Director's Designee:

DRC2636 (01/02)



STATE OF OHIO

(seal)

DEPARTMENT OF REHABILITATION
AND CORRECTION

| SUBJECT: Parole Board Hearing Policy | Page 1 of 20 |
|---|---|
| | SECTION: 111-<br>NUMBER: 07 |
| RULE/CODE REFERENCE: | SUPERCEDES:<br>111-07 dated 3/1/02 |
| RELATED ACA STANDARDS: | EFFECTIVE DATE:<br>May 22, 2002 |
| RELATED AUDIT STANDARDS: | APPROVED:<br>/s/Reginald A. Wilkinson |

## I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the director of the Department of Rehabilitation and Correction authority to manage and direct the total operations of the Department and to establish such rules and regulations as the Director prescribes.

## II. PURPOSE

The purpose of this policy is to define the classification procedures for placing inmates in Level 4 and Level 5 security classifications.

## III. APPLICABILITY

This policy applies to all staff and inmates involved in the classification process, except inmates who are classified as death row status and held at Mansfield Correctional Institution.

## IV. DEFINITIONS

Classification Level 4 - A security level for inmates who are involving in, but not leading others to commit violent, disruptive, predatory or riotous actions, and/or a threat to the security of the institution as set forth in the established Level 4 criteria. This classification replaces the classification previously known as "high maximum security." References to maximum security in the Administrative Code and other policies shall be construed as the equivalent of "level 4."

Classification Level 5—A security level for inmates who commit or lead others to commit violent, disruptive, predatory, riotous actions, or who otherwise pose a serious threat to the security of the institution as set forth in the established Level 5 criteria. This classification replaces the classification previously known as "high maximum security." References to" high maximum security" in the Administrative Code and other policies shall be construed as the equivalent of "level 5."

Privilege Level B—The initial privilege level assigned to an inmate classified into Levels 4 or 5.

Privilege Level A—A less restrictive privilege level, which inmates may be placed into by the Privilege Level Review Committee, after a review of the inmate's status in Levels 4 or 5.



Seriously Mentally Ill—Serious mental illness means a substantial disorder of thought or mood which significantly impairs judgement, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and is manifested by substantial pain or disability. Serious mental illness requires a mental health diagnosis, prognosis and treatment, as appropriate, by mental health staff. For purposes of this policy only, "seriously mentally ill" shall also include persons whose condition meets the criteria of the department's standard operating procedure for exclusion from OSP.

## V. POLICY:

It is the policy and objective of the classification level system to Create a process for the classification of inmates according to their security risk. This process shall consider behavior and such other objective factors as are available and relevant when assessing an inmate's institutional security needs. Inmates shall be placed at the lowest level of security possible that is still sufficient to ensure the safety and security of persons, the institution and the community. Inmates shall be placed at institutions that are consistent with their security classification rating. No level 5 inmate will be housed at the Ohio State Penitentiary who is determined to be seriously mentally ill, pursuant to the procedures of the departments bureau of mental health; or whose medical needs are inconsistent with that assignment, pursuant to Policy Directive 320-1 5, "Medical Classification."

## VI. PROCEDURES

### A. Placement in Level 4 or 5 from Reception

Inmates may be placed at Level 4 from Reception, based upon the results of the scoring of the Security Designation Form. The Reception Coordinator and the Warden/Designee must recommend the placement, and the Bureau of Classification must approve it. The Reception Coordinator shall use the Security Designation Long Forms or Initial Designation Forms for females, referenced at the end of this directive.

If an inmate is recommended for Level 5 placement at reception, the inmate shall receive a notice, a hearing and a written decision as with other level 5 placements, described further in paragraph C., below.

### B. Placement in Level 4 after Initial Institutional Assignment:

The Warden, Deputy Warden, Major, Unit Management Administrator (UMA), Unit Manager, Rules Infraction Board (RIB), or Reception Coordinator may initiate placement into the Level 4 Classifications. If the Department has already made an initial assignment following reception, the person initiating the placement shall use the Supervision Review Forms, referenced at the end of this directive. Once initiated, the Warden Designee shall establish a classification committee pursuant to rule 5120-9-53 of the Administrative Code to review the inmate's behavior and determine if the inmate meets one or more of the following Level 4 criteria:

1. The inmate has demonstrated physically assaultive and/or predatory behavior resulting in physical harm/injury to any person.



2. The nature of the inmate's behavior presents a current threat to the security and orderly operation of the institution and safety of others.
3. The inmate has planned or participated in a serious disturbance or riot.
4 The inmate has possessed major contraband which poses a threat or danger to the institution. This includes but is not limited to: weapons, drugs, escape contraband, large amounts of currency.
5. The inmate functions as an active member involved in disruptive security threat group behavior.
6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level 1 or 2 (or their equivalent, minimum or medium) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.
7. The inmate has established an inappropriate relationship with a staff member.
8. The inmate through repetitive and/or seriously disruptive behavior has demonstrated an inability to adjust to Level 3 as evidenced by repeated class II rule violations.

The classification committee shall review the completed Supervision Review Form and any relevant information. The inmate is to be served with a Notice of Hearing Form (DRC 2663 & 2664) 48 hours prior to the hearing, and afforded the opportunity to appear before the entire committee, unless waived in writing, to offer any pertinent information, explanation and/or objections to Level 4 placement. The inmate will also be afforded the opportunity to submit a written statement to the committee. The classification committee shall determine whether the inmate has met one of the criteria above and whether the inmate should be placed in

level 4. The classification committee shall make a recommendation accordingly.

The Classification committee shall forward its recommendation to the Warden/Designee. The Warden/Designee shall review the Supervision Review Form and all other information presented, and approve or disapprove the recommendation. If the warden approves the recommendation for level 4, he or she shall submit the recommendation to the Bureau of Classification for final disposition. The inmate may file a formal objection to the recommendation of the classification committee and warden with the Bureau of Classification within fifteen days. The Bureau of Classification will review the recommendation and any objections filed by the inmate, and make a final decision.

C. Placement in Level 5 after Initial Institutional Assignment

I. Reasons for Placement at Level 5 Security Classification.

An inmate may be placed at Level 5 Security Classification for either of the following administrative reasons:

A. The Rules Infraction Board (RIB) has found the inmate guilty of violating an institutional rule. As a result of the finding of guilt, the RIB has imposed confinement in disciplinary control as punishment for the offense. As a further result of the finding of guilt, the RIB has referred the inmate to the classification committee. The classification committee shall determine that the offensive behavior constitutes a threat to the safety and security of the institution and that such behavior meets one of the substantive criteria for placement at Level 5 Security Classification.



B. The inmate is guilty of a criminal offense and has been sentenced and committed to the custody of the Department of Rehabilitation and Corrections. The Department's reception coordinator or the warden of an institution may refer the inmate to the classification committee for a determination as to whether the offensive behavior constitutes a threat to the safety and security of the institution. The classification committee has determined that such behavior meets substantive criterion (2) for placement at Level 5 Security Classification.

II. Substantive Criteria Governing Placement at Level 5 Security Classification

A. Placement into the Level 5 classification may be initiated by the Warden, Deputy Warden, Major, UMA, Unit Manager, RIB or the Reception Coordinator. The person initiating the placement shall use the Security Designation Long Form, referenced at the end of this directive.

B. Once initiated, the Warden/Designee shall establish a classification committee to review the inmate's behavior and determine if the inmate meets one or more of the following Level 5 criteria:

1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in either serious physical injury or death to any person, or in an attempt to sexually assault any person, or to cause serious physical injury or death to any person. An inmate has demonstrated such behavior when the inmate has:

a. Physically assaulted another resulting in serious physical harm;

b. Assaulted or attempted to assault another with a deadly weapon
c. Compelled or attempted to compel another to perform sexual acts, engage in sexual conduct or sexual contact; or to submit to sexual contact; all by force or threat of force;
d. Compelled or coerced another, by force or the threat of serious physical harm or death, to provide anything of value, to perform any act, or to violate any rule.

2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.

3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.

4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. This includes but is not limited to:

a. Deadly weapons. 'Deadly weapon means any instrument, device, or thing capable of inflicting death, and designated or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.
b. Ammunition. "Ammunition" means any thing hurled by a weapon or exploded as a weapon, as bullets, gunpowder, shots, shells, bombs, grenades, rockets, etc.



c. Escape instruments. "Escape instruments" include any substance, device, instrument, or article designed or specially adapted for criminal use in an escape attempt; or possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use in an escape attempt.
d. Drugs of less than bulk amount, as defined by Ohio Revised Code, when possessed on multiple occasions.
e. Drugs for distribution. "Drugs for distribution" means any drug possessed in such amount as to subject an inmate to incarceration for at least a third degree felony as defined by the Ohio Revised Code.

5. The inmate functions as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.

6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four (or their equivalent, close or maximum) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.

7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution.

8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis.

9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

III. Procedural Requirements Governing Placement at Level 5 Security Classification.

A. Notice.

The inmate shall be served with Advance Written Notice (Form DRC2598, 2652, &2661) of the hearing at least forty-eight (48) hours prior to the commencement of the hearing. The notice shall include all of the reasons for the proposed placement and a summary of the evidence relied on. If the classification committee intends to use the statement of a witness whose identity it intends to withhold, the written notice shall indicate the classification committee's reliance on such statement and disclose as much of the substance of the information without jeopardizing the safety of persons or institutional security.

B. Hearing.

1. The classification committee shall make an audio recording of placement hearings.

The institution shall retain this record while the inmate is at Level 5 security status.

2. The inmate shall be afforded the opportunity to appear before the classification committee and make an oral or written statement if the inmate so desires. The inmate has a right to call witnesses and present documentary evidence as long as permitting him to do so will not be unduly hazardous or burdensome to institutional safety or correctional goals. If the inmate requests testimony of a witness who would otherwise be approved, and the witness in incarcerated at another facility, the witness shall be permitted to testify by telephone.



3. The inmate does not have a right of confrontation and cross-examination of witnesses, nor does the inmate have a right to counsel.

4. If the classification committee intends to use the statement of a witness whose identity it wishes to withhold, the classification committee shall inform the inmate of such reliance and disclose as much of the substance of the information without jeopardizing the safety of persons or institutional security. Before utilizing such information, the classification committee shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

5. If the classification committee intends to rely on a statement that previously was not made known to the inmate, the classification committee shall disclose the substance of such information to the inmate. Before utilizing such information, the classification committee shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

6. At the conclusion of the hearing, the classification committee shall inform the inmate orally of its recommendation. The classification committee shall prepare a contemporaneous written statement, which shall include its recommendation, the reasons for the recommendation and the evidence relied on. The classification committee shall provide the inmate with a copy of its recommendation (Forms DRC2637, 2638, & 2639).

7. The classification committee shall inform the inmate of his right to appeal and the method for the appeal (Form DRC2596).

C. Administrative Appeals

1. No person who serves on a prisoner's classification committee should decide, or take part in deciding, the prisoner's appeal to the Warden or the Bureau of Classification.

2. The inmate shall submit any written appeal to the warden or warden's designee ("warden/designee') within fifteen days following the classification committee's recommendation. After the warden/designee receives the classification committee's recommendation, the warden/designee shall independently review the recommendation for consistency with the standards of this policy.

3. If the warden/designee intends to rely on a statement that previously was not made known to the inmate, the warden/designee shall disclose the substance of such information to the inmate. Before utilizing such information, the warden/designee shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

4. If the warden/designee intends to use the statement of a witness whose identity he or she wishes to withhold, the warden/designee shall inform the inmate of such reliance and disclose as much of the substance of the information without jeopardizing the safety of persons or institutional security. Before utilizing such information, the warden/designee shall provide the inmate with a



reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

5. The warden/designee shall prepare a written statement, which shall include his or her recommendation, the reasons for the recommendation and the evidence relied on. The warden/designee shall provide the inmate with a copy of his or her recommendation (Form DRC2653 & 2657).

6. The warden/designee shall inform the inmate of his right to appeal and the method for the appeal (Form DRC2596).

7. The inmate must submit any written appeal which may include argument and documentary evidence within fifteen (15) days following the warden's recommendation.

8. After the Bureau of Classification receives the warden's recommendation and the classification committee's recommendation, the Bureau of Classification shall consider those recommendations and, determine whether the inmate should be placed at Level 5.

9. If the Bureau of Classification intends to rely on a statement that previously was not made known to the inmate, the Bureau of Classification shall disclose the substance of such information to the inmate. Before utilizing such information, the Bureau shall provide the inmate with a reasonable Opportunity to respond with a written statement and/or the submission of documentary evidence.

10. If the Bureau of Classification intends to use the statement of a witness whose identity it wishes to withhold, the Bureau of Classification shall inform the inmate of such reliance and disclose as much of the substance of the information without jeopardizing the safety of persons or institutional security. Before utilizing such information, the Bureau of Classification shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

11. The Chief of the Bureau of Classification shall prepare a written statement, which shall include its decision, the reasons for the decision and the evidence relied on (Form DRC2654 & 2655). The Bureau of Classification shall send a copy of the decision to the inmate within ten (10) working days following receipt of the inmate's appeal.

D. Placement in Level 5 from Level 4

A classification Committee shall review the inmate's behavior and determine if the inmate meets at least one of the criteria for Level 5.

If the inmate's repetitive and/or seriously disruptive behavior has demonstrated a chronic inability to adjust to level 4B, the documentation must clearly reflect this. The classification committee must ensure that the documentation includes any repeated class II rule violations, information and/or descriptions of the inmate's behavior and how the behavior disrupted the operation of the housing unit, facility or its operation. For example:

- List any rule violations with dispositions and the dates of any violations within the previous twelve months.



- Detail the number of times it was necessary to use force to restrain or control the inmate.
- List the instances of disruptions to meal, recreation, shower or scheduled activities, etc.
- Detail the impact on other inmates, threats, disruptions, etc.

The classification committee shall complete the process as described in subsection C., above.

E. 30 Day Review/Orientation Process

Placement into Level 4 or Level 5 varies in length depending on the nature of the initiating incident, criteria for placement, and/or demonstrated behavior in assigned level. All inmates placed into these levels shall have a review of their classification level completed by an assigned Unit staff member within 30 days of placement to determine if they have been properly classified. This review shall include a review of the inmate's file to ensure that proper documentation has been included detailing how/why the inmate has been classified into Level 4 or Level 5.

If the review finds that the inmate meets the appropriate criteria, Unit and/or programming staff will meet with the inmate to explain the classification and review processes and what the expectations are concerning his behavior, and appropriate program participation. This meeting will also afford the inmate the opportunity to request any needed assistance while assigned in the classification level. Staff will advise the inmate whether release to a general population institution in three years or less appears reasonably possible. Staff may recommend to the warden that the inmate be immediately placed in privilege level A. The warden shall make the final decision on such a privilege recommendation.

If the review finds that the inmate does not meet the Level 4 or Level 5 criteria, the reviewing staff member shall forward a written recommendation through the Deputy Warden of Operations, to the Warden recommending that the inmate be transferred to an appropriate institution. The reasons for the recommendaion must be listed to reflect why the inmate is not appropriate for Level 4 or Level 5 and is more appropriate for another level.

If the Warden concurs with the recommendation, the packet will then be forwarded, along with a newly completed Supervision Review Form, to the Bureau of Classification for appropriate action. If the Warden disagrees with the committee's recommendation, the inmate remains at his current status and this decision is not appeallable.

F. Privilege Level Review Process

Inmates placed into Level 4 or 5 will initially be assigned to privilege level B (5B or 4B). They will remain in this level until recommended for reduction by the Privilege Level Review Committee, and approved by the Warden/Designee. Reductions from Privilege Level B to A do not require the Bureau of Classification's approval. However, a Privilege Level Review, Level 5B, 5A & 4B Form (Form DRC2634, 2636, 2642, & 2643) must be completed, approved at the institution and entered into the DOTS system when a privilege level changes.

The privilege level review process not to be confused with a Supervision Review weighs both known behavior and future risk levels. The information reviewed during the assessment will include, but is not limited to:

- Program Involvement
- Current privilege level



- Time served in current privilege level
- Total time spent in level 5 and/or level 4
- Time left to Spend on Current sentence
- Time since last incident that resulted in inmate being designated level 5 or 4
- Conduct Reports
- Reason for placement
- Behavior in the last five years -- Prior to Level 4 or 5 classification
- Security level when placed
- Adjustment/behavior after placement
- Interaction with others (staff and/or inmates)
- The offender recognizes and acknowledges factors contributing to the commission of the placement offense and nature
- Other Factors which indicate a risk of future violence

The committee will use professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions. The privilege level review will be in a narrative form to record the factors considered by the evaluating employee. The inmate will appear before the Privilege Level Review Committee to ensure that he or she has the opportunity to have input into the process and respond to questions the committee may have during the review. The Privilege Level Review Committee will consist of a Unit staff member, a Custody staff member, and a Warden's designee. They may consult with any other staff person (Mental Health, Medical, Executive Staff, etc.) during the course of the review process.

G. Privilege Level Review for Level 4

Inmates placed in level 4 shall receive privilege level reviews during the time between annual supervision reviews and at the time of the annual review. The annual supervision review procedures are more fully described below. The provisions of

this section pertain only to privilege levels within the assigned security level.

Privilege level 4B is an entry level privilege status. Placement in 4B is for an indeterminate period. Inmates classified into Level 4B shall have an assessment completed every six months. Inmates who are in privilege level 4B and have been reviewed pursuant to this subsection may be placed in privilege level 4A.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express objections and explain the current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his or her eligibility for reduction. The first assessment will take place six months after the initial placement, and will continue every six months thereafter.

The Privilege Level Review Committee will make a recommendation to the warden/designee to either continue the inmate in 4B reduce the inmate to 4A, or increase the inmate from 4A to 4B, which must be supported by a written rationale. The warden/designee shall then render a decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.

H. Privilege Level Review for Level 5

Inmates placed in level 5 shall receive privilege level reviews during the time between annual supervision reviews and at



the time of the annual review. The annual supervision procedures are more fully described below. The provisions of this section pertain only to privilege levels within the assigned security level.

Inmates classified into Level 5B shall have an assessment completed every three months; inmates classified as Level 5A shall have an assessment completed every six months.

Placement in Level 5 is for an indeterminate period. Privilege level 5B is an entry level privilege status. Inmates who are in privilege level SB and have been reviewed pursuant to this subsection may be placed in privilege level 5A.

The Privilege Level Review Committee will consist of three members, designated by the warden/designee, such as the inmate's Unit Manager, Case Manager (to comment on educational programming, and other programming), Mental Health staff, and/or a custody staff person.

The inmate will appear before the committee to discuss and review the placement issues. The inmate shall have the opportunity to present information, express objections and explain the current classification. The committee will advise the inmate of their expectations and any steps the inmate can take to improve his or her eligibility for reduction. The first review for 5A inmates will take place six months after the initial placement, and will continue every six months thereafter. The first review for 5B inmates will take place three months after the initial placement, and will continue every three months thereafter.

At the annual (one-year) review a Security Level Review, Level 5 Form (Form DRC2647 & 2648) will be completed regardless of the recommendation affording the inmate the normal classification review and appeals process.

The Review Committee will make a recommendation to the Warden/Designee to either continue the inmate in 5B, reduce him to 5A or increase the inmate from 5A to 5B, which must be supported by a written rationale. The warden/designee shall then render a final decision based on the Committee's recommendation. This decision is not appeallable. The Privilege Level Review Committee may also recommend a special supervision level review if that is warranted, in their judgment. Such special reviews must be approved by an individual who could initiate such a placement and shall follow the procedures described for an annual supervision review, described below.



I. Reasons for Reduction from Level 5 Security Classification

I. An inmate shall be reduced from Level 5 security classification when there are no longer sufficient security concerns justifying retention at that level.

II. The following factors shall be considered in the evaluation of an inmate's readiness for reduction from Level 5 security classification:

A. Reason for placement in Level 4 or 5 and relevant circumstances;
B. Conduct Reports;
C. Current Privilege level:
D. Time Served in current privilege level;
E. Total time spent in level 5 and/or level 4;
F. Time left to spend on current sentence;
G. Time since last incident that resulted in inmate being designated level 5 or 4;
H. Program Involvement;
I. Behavior in the last five years, including prior to Level 4 or 5 classification;
J. Security level prior to placement;
K. Adjustment/behavior after placement;
L. Factors which indicate a risk of future violence;
M. Interaction with others (staff and/or inmates);
N. Recognition and acknowledgment of the factors contributing to the commission of the placement offense and nature;
O. The findings and recommendations of the previous assessment committees;
P. Previous review committees;
Q. The findings and recommendations of all assessment committees subsequent to the placement in level 4 or level 5; and

R. The findings and recommendations of all supervision and privilege review committees subsequent to placement in level 4 or level 5.

III. The following guidelines shall be adhered to in the evaluation of an inmate's readiness for reduction from Level 5 security classification:

A. Unless an inmate's prior conduct during incarceration resulted in death or extreme bodily harm of another, the evaluation should only consider behavior in the last five years, including prior to Level 4 or 5 classification.

B. A prisoner's prior conduct that results in the death or extreme bodily harm to another may only be considered for retaining a prisoner in Level 5 classification if that conduct was used as one of the justifications for the prisoner's initial placement to Level 5. In such a case, the prisoner's prior conduct that resulted in the death or extreme bodily harm of another may be considered but the conduct must be considered in conjunction with his conduct while at the OSP.

C. Unless an inmate's prior conduct during incarceration resulted in death, or extremely serious bodily harm of another, the inmate should generally qualify for reclassification to a lower security classification if he has not committed any violent act in the previous three years and has not been involved in any major misconduct in the previous two years while confined at the OSP.

IV. At least twice a year, the classification committee shall notify each Level 5 inmate in writing and orally of the inmate's progress toward security level reduction. Such notification shall take place as a part of the regularly conducted privilege or security level reviews. Such notice



shall advise the inmate of any specific conduct necessary for that prisoner to be reduced from Level 5 as well as the amount of time it will take before the inmate's security level is likely to be reduced.

J. Procedures for Annual Supervision Level Review

All Level 4 and Level 5 inmates shall have supervision reviews completed at least annually. The classification committee shall have three members, consisting of the Deputy Warden of Operations/Designee, the Unit Management Administrator, a Unit Manager, a Case Manager and/or other Unit Staff member and may include a Mental Health staff person. All annual reviews must include a Director's designee to review all pertinent information and make a recommendation. This committee shall review the partially completed Security Level Review, Level 5 Form (Form DRC 2647 & 2648). A copy of this document, as explained in the next paragraph, is to be attached to the notice of the hearing.

II. Notice of Hearing. The inmate shall be served with advance written notice (Form DRC 2646) of the hearing at least forty-eight (48) hours prior to the commencement of the hearing. The notice shall include the date and time of the hearing. Attached to the notice will be a copy of the classification committee's report which was completed at the time of placement; and a copy of the Security Level Review Form containing all pre-hearing information. Those documents provide the inmate with a summary of the evidence which the classification committee will consider in determining whether to retain or reduce the inmate's Level 5 security classification.

I. Hearing.

A. The classification committee shall make an audio recording of the retention hearing. The institution shall retain this record while the inmate is at Level 5 security status.

B. The inmate shall be afforded the opportunity to appear before the classification committee and make an oral or written statement if the inmate so desires. The inmate has a right to call witnesses and present documentary evidence as long as permitting him to do so will not be unduly hazardous or burdensome to institutional safety or correctional goals. If the inmate requests testimony of a witness who would otherwise be approved, and the witness in incarcerated at another facility, the witness shall be permitted to testify by telephone.

C. The inmate does not have a right of confrontation and cross-examination of witnesses, nor does the inmate have a right to counsel.

D. If the classification committee intends to use the statement of a witness whose identity it wishes to withhold, the classification committee shall inform the inmate of such reliance and disclose as much of the substance of the information without jeopardizing the safety of persons and institutional security. Before utilizing such information, the warden shall provide the inmate with a reasonable Opportunity to respond with a written statement and/or the submission of documentary evidence.

E. If the classification committee intends to rely on a statement that previously was not made known to the inmate, the committee shall disclose the substance of such information to the inmate. Before utilizing such information, the committee shall provide the inmate with a reasonable opportunity to respond with a written



statement and/or the submission of documentary evidence.

F. At the conclusion of the hearing, the classification committee shall inform the inmate orally of its recommendation. The classification committee shall prepare a contemporaneous written statement, which shall include its recommendation, the reasons for the recommendation and the evidence relied on (Form DRC 2660). The classification committee shall provide the inmate with a copy of this form.

G. The classification committee shall inform the inmate of his right to appeal and the method for the appeal.

II. Administrative Appeals.

A. No person who serves on a prisoner's classification committee should decide, or take part in deciding, the prisoner's appeal to the Warden or the Bureau of Classification.

B. The inmate shall submit any written appeal to the warden or warden's designee (warden/designee") within fifteen days following the classification committee's recommendation. After the warden or the warden/designee receives the classification committee's recommendation, the warden/designee shall review the recommendation for consistency with the standards of this policy.

C. If the warden intends to rely on a statement that previously was not made known to the inmate, the warden shall disclose the substance of such information to the inmate. Before utilizing such information, the warden shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

D. If the warden intends to use the statement of a witness whose identity he or she wishes to withhold, the warden shall inform the inmate of such reliance and disclose as

much of the substance of the information without jeopardizing the safety of persons or institutional security. Before utilizing such information, the warden shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

E. The warden/designee shall prepare a written statement, which shall include his or her recommendation, the reasons for the recommendation and the evidence relied on (Form DRC 2650). The Warden shall provide the inmate with a copy of his/her recommendation.

F. The warden shall apprise the inmate of his right to appeal and the method for the appeal.

G. The inmate shall submit any written appeal, which may include argument and documentary evidence, within fifteen (15) days following the warden's recommendation.

H. After the Bureau of Classification receives the warden's recommendation and the classification committee's recommendation, the Bureau of Classification shall consider those recommendations and, determine whether the inmate should be retained at Level 5.

I. If the Bureau of Classification intends to rely on a statement that previously was not made known to the inmate, the Bureau of Classification shall disclose the substance of such information to the inmate. Before utilizing such information, the Bureau shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

J. If the classification committee intends to use the statement of a witness whose identity it wishes to withhold, the classification committee shall inform the inmate of such reliance and disclose as much of the substance of the information without jeopardizing the safety of persons or institutional security. Before



utilizing such information, the classification committee shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

K. The chief of the bureau shall prepare a written statement, which shall include his or her decision, the reasons for the decision and the evidence relied on (Form DRC 2656). The Bureau of Classification shall send a copy of the decision to the inmate within ten (10) working days following receipt of the inmate's appeal.

L. Optional Procedure for Placement and Retention in Level 5

The Department, its employees and its administrators may utilize an optional procedure when placing an inmate in level 5 or considering whether an inmate should be retained in level 5. This procedure ~hall be optional at the discretion of the staff and officials of the department. This procedure may be utilized to replace any step or all Steps in the processes described above for placement and retention at level 5.

The staff and officials may conduct any hearing, consideration or proceeding using videoconference communications. The inmate; the case manager, unit management administrator ( "O.K." ) or other institution representative; and the chief of the bureau of classification or designee, at a minimum, shall participate in the videoconference hearing. The case manager, O.K. or other institution representative shall provide information about the inmate's adjustment, program participation and other information relevant to the decision. The warden or a designee may also participate to present information or opinions, as may any other person who may offer information that is relevant to the issue being considered.

The institution representatives shall present information concerning the items for consideration by a classification committee conducting an annual supervision level review, as identified in the subsection above. The chief of the bureau of classification may obtain any additional information as will likely be reasonably relevant to the decision, and is encouraged to obtain it in advance of the proceeding to assist in the efficient consideration of the matter. The chief of the bureau may continue the hearing at any time to allow the collection of additional information or to assist with the deliberative process.

The inmate shall be permitted a reasonable opportunity to present information and statements regarding the issue at hand. The department may videotape the proceeding for its subsequent use, but taping is not mandatory.

If the Bureau of Classification intends to use the statement of a witness whose identity it wishes to withhold, the Bureau of Classification shall inform the inmate of such reliance and disclose as much of the substance of the information without jeopardizing the safety of persons or institutional security. Before utilizing such information, the Bureau of Classification shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.

If the Bureau of Classification intends to rely on a statement that previously was not made known to the inmate, the Bureau of Classification shall disclose the substance of such information to the inmate. Before utilizing such information, the Bureau shall provide the inmate with a reasonable opportunity to respond with a written statement and/or the submission of documentary evidence.



The chief of the bureau shall evaluate the inmate for retention at level 5 or transfer to a lower security level as described in the subsection of this policy that addresses the annual supervision level review. The chief shall determine whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security, within his or her professional correctional judgment. If the chief of the bureau relies upon confidential information, he or she shall indicate this reliance and shall disclose to the inmate as much of the substance of the information as possible.

The chief shall notify the inmate of the decision. The chief may choose to verbally notify the inmate of the decision at the conclusion of the videoconference, though it is not required. In every case, the decision of the chief and supporting reasons shall be reduced to writing, and a copy shall be given to the inmate. The inmate shall be permitted to request that the chief of the bureau reconsider the decision. Such request shall be in writing, directed to the chief of the bureau and must state reasons in Support of the request.

List of Forms Appearing on Intranet

DRC2568 Security Designation Long Form
DRC2630 " , pg2
DRC2569 " , pg3

DRC2605 Initial Designation Forms, Females
DRC2606 " , pg2
DRC2607 " , pg3

DRC2098 Supervision Review Forms
DRC2094 " , pg2
DRC2629 " , pg3
DRC2338 " , pg4

DRC2663 Notice of Hearing, Level 4 Placement
DRC2664 " , pg2

DRC 2598 Notice of Hearing, Level 5 Placement
DRC 2652 " , pg2
DRC 2661 " , pg3

DRC 2658 Request for Witness

DRC 2637 Classification Committee Recommendation
DRC 2638 " , pg2
DRC 2639 " , pg3

DRC 2662 Classification Committee Record of Hearing

DRC 2627 Summary of Inmate Information

DRC 2628 Summary of Staff Information

DRC 2645 Confidential Information

DRC 2596 Notice of Appeal

DRC2653 Warden's Recommendation
DRC 2657 " , pg 2

DRC 2654 Bureau of Classification's Decision
DRC2655 " , pg2

DRC 2634 Privilege Level Review
DRC 2636 " , pg2
DRC 2642 " , pg3
DRC 2643 " , pg4

DRC 2646 Notice of Hearing, Security Level Review



DRC 2647 Security Level Review
DRC 2648 " ,pg.2

DRC 2649 Classification Committee Record of Hearing, Level 5 Rev.

DRC 2660 Recommendation of the Classification Comm., Security Rev.

DRC 2650 Recommendation of the Warden, Security Rev.

DRC 2656 Decision of the Bureau of Classification, Security Rev.

## RECOMMENDED PRIVILEGE LEVELS FOR LEVELS 5 AND 4:

| | Level 5B | Level 5A | Level 4B | Level 4A |
|---|---|---|---|---|
| Clothing | 3 State Issue Uniforms | 3 State Issue Uniforms | 3 State issue Uniforms | 3 State Issue Uniforms |
| Privilege Level Review | 3 Months | 6 Months | 6 Months | N/A |
| Classification Status Review | Annually | Annually | Annually | Annually |
| Phone Calls | One ten minute call per month. All others only by request of Attorney of Record or confirmed serious illness or death in the family | Two ten minute calls per month. All others only by Request of Attorney of Record or confirmed serious illness or death in the family. | One ten minute call per week. All others only by request of Attorney of Record or confirmed serious illness or death in the family | 2 times per day |

| | | | | |
|---|---|---|---|---|
| | (Warden's Discretion) | (Warden's Discretion) | (Warden's Discretion) | |
| Recreation | 5 one-hour periods per week, inside, or outside recreation areas. | 5 one-hour periods per week; inside or outside recreation areas. Congregate recreation opportunity with at least one other inmate. | 5 one-hour periods per week; inside or outside recreation pods. Congregate recreation with at least one other inmate. | Seven 1 ½ hour periods per week |
| Shaving | 3 times per week | 3 times per week | 5 times per week | Anytime during the day. |
| Shower | 5 times per week | 5 times per week | 5 times per week | Twice per day. |
| TV | State Issued or purchase from commissary. Programming only. | State Issued or purchase from commissary. Programming and Network. | Network and Institutional programming provided on range TV. Movie rentals | May have personal TV. |

| | | | | |
|---|---|---|---|---|
| | | | on weekends and holidays. | |
| Walkman | Non | Walkman w/AM/FM w/cassette player. No cassettes permitted. Battery operated. | Walkman/Cassette AM/FM w/cassette player. Battery operated. Five (5) cassettes permitted. | Commissary Purchase or Approved Vendor |
| Visits | Non-Contact, 2 visits per month, per visitor for up to 2.5 hours; Attorney of record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 3.5 hours; Attorney of Record, Clergy of Record. | Non-Contact, 2 visits per month, per visitor for up to 4 hours; Attorney of Record, Clergy of Record. | Contact, 2 visits per month for up to 7 hours. |
| Library/Legal Service | Library: 3 paperback books Legal: Per kite to Paralegal. | Library: 4 paperback books Legal: Per kite to Paralegal. | Library: 5 paperback books Legal: Per kite to paralegal. | Minimum 4 ½ hours per week. |

| | | | | |
|---|---|---|---|---|
| Programming | Broadcast over TVs provided in each cell<br>Small group programming in program booths | Broadcast over TVs provided in each cell<br>Small group programming in program booths | Broadcast over TVs provided on range.<br>Small group counseling, no more than four inmates. | Broadcast over TV's; Small group counseling. |
| Commissary Spending Limit Twice Per Month | $30.00 | $50.00 | $70.00 | $100.00 |

(*seal*) Attorney General
Betty D. Montgomery

VIA OVERNIGHT DELIVERY

May 28, 2002

The Honorable James S. Gwin
United States District Judge
Federal Building & U.S. Courthouse
Two South main Street, Room 510
Akron, OH 44308

Re: *Austin, et al. v. Wilkinson, et al*
Case No. 4:01CV071

Dear Judge Gwin:

On May 23, 2002, this office mailed to your office a notebook containing a copy of Revised Policy 111-07 and the pertinent forms. Each form has a "form number." The forms are presented in numerical order, which I find confusing.

For the sake of clarity, I enclose another notebook which presents the forms in procedural sequence. A copy of the notebook is being forwarded to Staughton and Alice Lynd.

Sincerely,

BETTY D. MONTGOMERY
Attorney General

Joseph M. Mancini
Assistant Attorney General
Corrections Litigation Section
(614) 644-7233

cc: Staughton Lynd, Esq.
Alice Lynd, Esq.



Notice Of Hearing

Proposed Level 5
Security Placement

| Inmate Name: | Number: |
|---|---|
| Lock: | Institution: |

Purpose of Hearing: You have been referred to the classification committee for a hearing to determine whether you should be placed at Security Level 5.

Issue being considered for the proposed placement: The issue to be considered is whether your already proven conduct, in conjunction with an assessment of your overall record, constitutes a threat to the safety and security of the institution.

The previously proven behavior is described in the section of this notice with the heading, "Evidence Relied On." The committee will determine whether that behavior, together with your overall record, constitutes a threat to the safety and security of the institution. In addressing this issue, the committee will determine whether your proven behavior falls within any of the categories below.

Behavior Categories: *Indicate (with a check) which of the following behavioral categories apply to the inmate's proven behavior.*

☐ 1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in either serious physical injury or death to any person, or in an attempt to sexually assault any person, or to cause serious physical injury or death to any person. An inmate has demonstrated such behaviors when the inmate has:

☐ a. Physically assaulted another resulting in serious physical harm;

☐ b. Assaulted or attempted to assault another with a deadly weapon

☐ c. Compelled or attempted to compel another to perform sexual acts; engage in sexual conduct or sexual contact; or to submit to sexual contact; all by force or threat of force;

☐ d. Compelled or coerced another, by force or the threat of serious physical harm or death, to provide anything of value, to perform any act, or to violate any rule.

☐ 2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.

☐ 3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.

☐ 4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. The includes but it not limited to:

☐ a. Deadly weapons. "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designated or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

☐ b. Ammunition. "Ammunition" means any thing hurled by a weapon or exploded as a weapon, as bullets, gunpowder, shots, shells, bombs, grenades, rockets., etc.

☐ c. Escape instruments. "Escape instruments" include any substance, device, instrument, or article commonly used for criminal purposes, under



circumstances indicating the item is intended for criminal use in an escape attempt.

☐ d. Drugs of less than bulk amount, as defined by the Ohio Revised Code, when possessed on multiple occasions.

☐ e. Drugs for distribution. "Drugs for distribution" means any drug possessed in such amount as to subject an inmate to incarceration for at least a third degree felony as defined by the Ohio Revised Code.

DRC2598 (Rev. 05/02) DISTRIBUTION: White-records Canary-Unit File Pink-Inmate Goldenrod-Bureau of Classification

ACA 4288

Notice Of Hearing
Page 2
*Proposed Level 5*
*Security Placement*

| Inmate Name: | Number: |
|---|---|
| Lock: | Institution: |

☐ 5. The inmate functions as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.

☐ 6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four (or their equivalent, close or maximum) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plan.

☐ 7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in threat to the security of the institution.

☐ 8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis.

☐ 9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

Reason(s) for the proposed placement and the evidence relied on to support of those reason(s)



***Instructions:*** ***Set forth a detailed factual account of the incident (behavior and circumstances) that support the reason(s) for the proposed placement.***

***In addition, if the incident that triggers the proposed placement is a finding of guilt of an institutional violation by the Rules Infraction Bard (RIB), attach a copy of the RIB report of the proceeding. If the event that triggers the proposed placement is a finding or plea of guilt in a criminal proceeding, attach a copy of the court's journal entry.***

_____
_____
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_____

DRC2652 (Rev 05/02) DISTRIBUTION: White-Records Canary-Unit File Pink-Inmate Goldenrod-Bureau of Classification
ACA 4288

Notice Of Hearing
Page 3
*Proposed Level 5*
*Security Placement*

| Inmate Name: | Number: |
|---|---|
| Lock: | Institution: |

Inmate Rights At Hearing

An inmate has a right to be present at the hearing and respond to the evidence presented. The inmate has a right to make an oral statement and/or submit a written statement.

An inmate has a right to call available witnesses and present documentary evidence provided that doing so would not jeopardize or threaten individual safety or institutional security. Persons at another institution may testify by telephone. Forms to request the appearance of witnesses should be obtained from and returned to the chairperson of the classification committee prior to the hearing.

The classification committee does not have the authority to re-hear issues already decided in prior disciplinary or criminal proceedings. Thus, the testimony of witnesses and documentary evidence must be relevant to the issue being considered.

A copy of this notice of hearing was serviced upon the above-named inmate on:

| Date: | Time: | Staff: |
|---|---|---|
| | | |



☐ I wish to waive my right to forty-eight (48) hours between the time I received a copy of this notice and the time I have my hearing.

☐ I wish to waive my right to attend the hearing.

| Inmate Signature: | Number: |
|---|---|
| | |

DRC2661 (Rev 05/02) DISTRIBUTION: White-Records Canary-Unit File Pink-Inmate Goldenrod-Bureau of Classification

ACA 4288

## Request For Witness
## Before The Classification Committee

| Inmate Being Heard: | Institution: |
|---|---|
| | |

requests that the following person:

| Name of Witness: | Institution: |
|---|---|
| | |

appear as a witness at the hearing to consider Security Level 5 placement.

The above named witness will testify as follows:

_____

_____

_____

| Inmate Signature: | Number: | Date: |
|---|---|---|
| | | |

### WITNESS REQUEST DECISION

☐ Request Approved ☐ Request Disapproved

Reason(s):_____

_____

_____

| Classification Committee Chairman: | Date: |
|---|---|
| | |

DRC 2658 (5/02)



## Classification Committee Recommendation
## *Proposed Security Level 5 Placement*

| Inmate Name: | | Number |
|---|---|---|
| Lock: | Tape: | Institution: |

The hearing was held on: _____

_____

The committee members were _____

_____

The inmate ☐ was ☐ was not present for the following reason(s): _____

_____

_____

Issue being considered for the proposed placement: The issue to be considered is whether the inmate's already proven conduct, in conjunction with an assessment of the inmate's overall record, constitutes a threat to the safety and security of the institution. In addressing this issue, the committee will determine whether the inmate's proven behavior falls within any of the categories below.

Behavior Categories: *Indicate (with a check) which of the following behavioral categories apply to the inmate's proven behavior.*

☐ 1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting either serious physical injury or death to any person, or in an attempt to sexually assault any person, or to cause serious physical serious injury or death to any person. An inmate has demonstrated such behaviors when the inmate has:

☐ a. Physically assaulted another resulting in serious harm;

☐ b. Assaulted or attempted to assault another with a deadly weapon.

☐ c. Compelled or attempted to compel another to perform sexual acts; engage in sexual conduct or sexual contact; or to submit to sexual contact; all by force or threat of force;

☐ d. Compelled or coerced another, by force or the threat of serious physical harm or death, to provide anything of value, to perform any act, or to violate any rule.

☐ 2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.

☐ 3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted n the taking of a hostage, significant property damage, physical harm, or loss of life..

DISTRIBUTION: WHITE-Records GREEN-Unit File
CANARY-Inmate PINK-Bureau of Classification
GOLDENROD-WARDEN
DRC 2637 (Rev. 05/02) ACA 4282, 4288, 4289



Classification Committee Inmate Recommendation
Proposed Security Level 5 Placement, Page 2

| Inmate Last Name: | Number: |
|---|---|
| | |

☐ 4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. The includes by it not limited to:

☐ a. Deadly weapons. "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designated or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

☐ b. Ammunition. "Ammunition" means any thing hurled by a weapon or exploded as a weapon, as bullets, gunpowder, shots, shells, bombs, grenades, rockets, etc.

☐ c. Escape instruments. "Escape instruments" include any substance, device, instrument, or article designed or specially adapted for criminal use in escape attempt; or possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use in an escape attempt.

☐ d. Drugs of less than bulk amount, as defined by the Ohio Revised Code, when possessed on multiple occasions.

☐ e. Drugs for distribution. "Drugs for distribution" mans any drug possessed in such amount as to

subject an inmate to incarceration for at least a third degree felony as defined by the Ohio Revised Code.

☐ 5. The inmate functions as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.

☐ 6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four (or their equivalent, close or maximum) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.

☐ 7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in threat to the security of the institution.

☐ 8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis.

☐ 9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

DRC 2638 (Rev. 05/02) DISTRIBUTION: WHITE-Records GREEN-Unit File CANARY-Inmate PINK-Bureau of Classification GOLDENROD-WARDEN
ACA 4282, 4288, 4289



Classification Committee Recommendation
Proposed Security Level 5 Placement, Page 3

| Inmate Last Name: | Number: |
|---|---|
| | |

Recommendation.

_____

Reasons for the Committee's Recommendation.

_____
_____
_____
_____

Evidence relied on to support the reason(s) for the recommendation.

*Instruction: Set forth the specific facts (evidence) relied on to support the reason(s) for the recommendation.*

_____
_____
_____
_____
_____

Was the inmate given a copy of this hearing form? ☐ YES
Was the Inmate notified of appeal procedures? ☐ YES
Was the inmate given a copy of the Notice of Appeal Recommendation for level 5 (DRC2596)? ☐ YES

| Committee Member: | Committee Member: |
|---|---|
| Committee Member: | Date: |

DRC 2639 (Rev. 05/02)ACA 4282, 4288, 4289

## Notice Of Appeal
## SECURITY LEVEL 5

| Name: | Number: |
|---|---|
| Institution: | Date: |

I am appealing:

☐ Recommended placement at level 5
☐ Continued placement at Level 5

The recommendation was made by:

☐ The Classification Committee
☐ The Warden

This hearing was conducted on

_____ at _____
DATE INSTITUTION

☐ I am filing this appeal within fifteen days after the Classification Committee/Warden informed me of the recommendations and action in accordance with Policy Directive 111-07.

In my opinion this decision is incorrect for the following reasons:

WARNING: You must state clearly and in detail the reasons you feel the decision is incorrect.

_____

_____

_____

(If more space is needed, attach additional sheets)

| Signature: | Number: | Date: |
|---|---|---|
| | | |

DRC 2596 (Rev. 05/02) DISTRIBUTION: WHITE-Warden/Bureau of Classification CANARY-Inmate
ACA 4288



## Warden's Recommendation
## *Proposed Security Level 5 Placement*

| Inmate Name: | | Number: |
|---|---|---|
| Lock: | Tape: | Institution: |

Issue being considered for the proposed placement: The issue to be considered is whether the inmate's already proven conduct, in conjunction with an assessment of the inmate's overall record, constitutes a threat to the safety and security of the institution. In addressing this issue, the Warden will determine whether the inmate's proven behavior falls within any of the categories below.

Behavior Categories: *Indicate (with a check) which of the following behavioral categories apply to the inmate's proven behavior.*

☐ 1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in either serious physical injury or death to any person, or in an attempt to sexually assault any person, or to cause serious physical injury or death to any person. An inmate ha demonstrated such behaviors when the inmate has:

☐ a. Physically assaulted another resulting in serious physical harm;
☐ b. Assaulted or attempted to assault another with a deadly weapon
☐ c. Compelled or attempted to compel another to perform sexual acts; engage in sexual conduct or sexual contact; or to submit to sexual contact; all by force or threat of force;
☐ d. Compelled or coerced another, by force or the threat of serious physical harm or death, to provide anything of value, to perform any act, or to violate any rule.

☐ 2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.

☐ 3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.

☐ 4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. The includes but it not limited to:

☐ a. Deadly weapons. "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designated or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

☐ b. Ammunition. "Ammunition" means any thing hurled by a weapon or exploded as a weapon, as bullets, gunpowder, shots, shells, bombs, grenades, rockets., etc.

☐ c. Escape instruments. "Escape instruments" include any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use in an escape attempt.

☐ d. Drugs of less than bulk amount, as defined by the Ohio Revised Code, when possessed on multiple occasions.



☐ e. Drugs for distribution. "Drugs for distribution" means any drug possessed in such amount as to subject an inmate to incarceration for at least a third degree felony as defined by the Ohio Revised Code.

DRC 2653 (Rev 05/02) DISTRIBUTION: WHITE-Records CANARY-Unit File PINK-Inmate GOLDENROD-Bureau of Classification ACA 4282, 4288, 4289

Warden's Recommendation – Page 2
Proposed Security Level 5 Placement

| Inmate Name: |
| --- |
| Number |

☐ 5. The inmate functions as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.

☐ 6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four (or their equivalent, close or maximum) security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.

☐ 7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in threat to the security of the institution.

☐ 8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis.

☐ 9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

Recommendation.

_____

Reasons for the Warden's Recommendation.

_____

_____

_____

Evidence relied on to support the reason(s) for the recommendation



*Instruction: Set forth the specific facts (evidence) relied on to support the reason(s) for the recommendation.*

_____

_____

☐Yes ☐No Was the inmate notified of the appeal procedures?

☐ Yes ☐ No Was the inmate given a copy of the Notice of Appeal form, DRC2596?

__ Yes __ No Was the inmate given a copy of this document?

| Warden/Designee's Signature: | Date: |
| --- | --- |
| | |

DISTRIBUTION: WHITE-Records CANARY-Unit File
PINK-Inmate GOLDENROD-Bureau of Classification

Bureau Of Classification's Decision
*Proposed Security Level 5 Placement*

| Inmate Name: | Number: |
|---|---|
| Institution: | |

Issue being considered for the proposed placement: The issue to be considered is whether the inmate's already proven conduct, in conjunction with an assessment of the inmate's overall record, constitutes a threat to the safety and security of the institution. In addressing this issue, the bureau will determine whether the inmate's proven behavior falls within any of the categories below.

Behavior Categories: Indicate (with a check) which of the following behavioral categories apply to the inmate's proven behavior.

☐ 1. The inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in either serious physical injury or death to any person, or in an attempt to sexually assault any person, or to cause serious physical injury or death to any person. An inmate has demonstrated such behaviors when the inmate has:

- ☐ a. Physically assaulted another resulting in serious physical harm;
- ☐ b. Assaulted or attempted to assault another with a deadly weapon
- ☐ c. Compelled or attempted to compel another to perform sexual acts; engage in sexual conduct or sexual contact; or to submit to sexual contact; all by force or threat of force;
- ☐ d. Compelled or coerced another, by force or the threat of serious physical harm or death, to



provide anything of value, to perform any act, or to violate any rule.

☐ 2. The nature of the criminal offense committed prior to incarceration constitutes a current threat to the security and orderly operation of the institution and to the safety of others, for example, serious assaults against law enforcement, participation in organized criminal activity or actions indicating a serious escape risk.

☐ 3. The inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life.

☐ 4. The inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution. The includes but it not limited to:

- ☐ a. Deadly weapons. "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designated or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.
- ☐ b. Ammunition. "Ammunition" means any thing hurled by a weapon or exploded as a weapon, as bullets, gunpowder, shots, shells, bombs, grenades, rockets., etc.
- ☐ c. Escape instruments. "Escape instruments" include any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use in an escape attempt.
- ☐ d. Drugs of less than bulk amount, as defined by the Ohio Revised Code, when possessed on multiple occasions.

☐ e. Drugs for distribution. "Drugs for distribution" means any drug possessed in such amount as to subject an inmate to incarceration for at least a third degree felony as defined by the Ohio Revised Code.

DRC 2654 (Rev. 05/02) DISTRIBUTION: WHITE-Records CANARY- Unit File PINK-Inmate GOLDENROD-Bureau of Classification ACA 4282, 4288, 4289



Bureau of Classification's Decision
*Proposed Security Level 5 Placement – Page 2*

| Inmate Name: | Number |
|---|---|
| Institution: | |

☐ 5. The inmate functions as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior.

☐ 6. The inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four (or their equivalent, close or maximum security facility or while under supervision outside of the facility, resulting in physical harm or threatened serious physical harm to others or caused serious destruction to the physical plant.

☐ 7. The inmate has demonstrated an ability to compromise the integrity of staff, which resulted in threat to the security of the institution.

☐ 8. The inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis.

☐ 9. The inmate through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations.

Decision.

_____

Reasons for the Bureau's Decision.

_____

_____

_____

Evidence relied on to support the reason(s) for the decision
*Instruction: Set forth the specific facts (evidence) relied on to support the reason(s) for the decision.*

_____

_____

_____

Provided a copy of this decision to the inmate:_____
(date)

| Bureau Representative's Signature: | Date: |
|---|---|
| | |

DRC 2655 (Rev. 05/02)



Notice Of Hearing
*Security Level 5 Review*

| Inmate Name: | | Number: |
|---|---|---|
| Lock: | Institution: | |

You have been referred to the Classification Committee for hearing to determine whether you should be retained at Security Level 5. The hearing will be held on _____.

Issue being Considered.

The issue to be addressed is whether the reasons for your placement at Level 5 Security Classification cease to exist. In other words, the issue is whether you continue to pose a threat to the safety and security of the prison system.

The classification committee does not have the authority to re-hear issues already decided in prior disciplinary or criminal proceedings.

Inmate Rights At Hearing

An inmate has a right to be present at the hearing and respond to the evidence presented. The inmate has a right to make an oral statement and/or submit a written statement.

An inmate has a right to call available witnesses and present documentary evidence provided that doing so would not jeopardize or threaten individual safety or institutional security. Persons at atoner institution may testify by telephone. forms to request the appearance of witnesses should be obtained from and returned to the chairperson of the classification committee prior to the hearing.

The classification committee does not have the authority to re-hear issues already decided in prior disciplinary criminal

proceedings Thus, the testimony of witnesses and documentary evidence must be relevant to the issue being considered.

| Staff Signature: |
|---|

☐ A copy of the Classification Committee Report from your initial placement is attached.
☐ A copy of your current Security Level Review form is attached, with pre-hearing information.

A copy of this Notice of Hearing was served upon the above-named inmate on:

| Date: | Time: | Staff: |
|---|---|---|

DRC2646 (05/02) DISTRIBUTION: White-Records Canary-Unit File Pink-Inmate Goldenrod-Bureau of Classification ACA 4288



Recommendation of the Classification Committee
Security Level 5 Review

| Inmate Name: | Number: |
|---|---|
| Date of Review Committee Hearing: | |

Recommendation.

_____

Reasons for the Committee's Recommendation.

_____

_____

Evidence relied on to support the reason(s) for the recommendation
Instruction: *Set forth the specific facts (evidence) relied on to support the reason(s) for the recommendation.*

_____

_____

_____

☐ YES ☐ NO Was the inmate notified of the appeal procedures?
☐ YES ☐ NO Was the inmate given a copy of the Notice of Appeal form, DRC2596?
☐ YES ☐ NO Was the inmate given a copy of this form?

| Classification Committee Chair: |
|---|

Distribution: WHITE-Records GREEN-Unit File CANARY – Inmate PINK – Bureau of Classification GOLDENROD-WARDEN
DRC 2660 (Rev. 05/02) ACA 4282, 4288, 4289

Recommendation of the Warden
Security Level 5 Review

| Inmate Name: | Number: |
|---|---|
| Date of Review Committee Hearing: | |

Recommendation.

_____

Reasons for the Warden's Recommendation.

_____
_____
_____

Evidence relied on to support the reason(s) for the recommendation
Instruction: *Set forth the specific facts (evidence) relied on to support the reason(s) for the recommendation.*

_____
_____
_____

☐ YES ☐ NO Was the inmate notified of the appeal procedures?
☐ YES ☐ NO Was the inmate given a copy of the Notice of Appeal form, DRC2596?
☐ YES ☐ NO Was the inmate given a copy of this form?

| Warden/Designee's Signature: |
|---|

DRC 2650 (Rev. 05/02) ACA 4282, 4288, 4289



Decision of the Bureau of Classification
Security Level 5 Review

| Inmate Name: | Number: |
|---|---|
| Date of Review Committee Hearing: | |

Decision:_____

Reasons for the Decision of the Bureau of Classification:

_____
_____
_____

Evidence relied on to support the reason(s) for the recommendation
Instruction: *Set forth the specific facts (evidence) relied on to support the reason(s) for the recommendation.*

_____
_____
_____

Provided a copy of this decision to the inmate: _____

_____
(*date*)

| Bureau Representative's Signature: | Date: |
|---|---|

Distribution: WHITE-Records GREEN-Unit File CANARY–Inmate PINK – Bureau of Classification GOLDENROD-WARDEN
DRC 2656 (Rev. 05/02) ACA 4282, 4288, 4289

OHIO

(SEAL)

DEPARTMENT OF REHABILITATION
AND CORRECTION

| | |
|---|---|
| SUBJECT:<br><br>Parole Board Hearing Policy | Page 1 of 11<br>SECTION:<br>NUMBER: 501.36 |
| RULE/CODE REFERENCE: | SUPERCEDES:<br>501.36 dated 08/01/96 |
| RELATED ACD STANDARDS: | EFFECTIVE DATE:<br>December 22, 2000 |
| RELATED AUDIT STANDARDS: | APPROVED:<br>/s/Reginald A. Wilkinson |

## I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the director of the Department of Rehabilitation and Correction authority to manage all divisions and institutions of the Department and to establish such rules and regulations as he prescribes.

## II. PURPOSE

The purpose of this policy is to foster consistent parole board hearing procedures designed to promote public confidence and safety, as well as fair and objective decision-making.



## III. APPLICABILITY

This policy shall apply to all employees of the Adult Parole Authority, institution record offices, unit management administrators, unit management staff and all offenders.

## IV. DEFINITIONS

A. CENTRAL OFFICE BOARD REVIEW:

Case consideration by at least a majority of the members of the parole board, referred by any one parole board member or by a review panel. Central office board review does not require that the members be sitting together in considering the case.

B. CLINICAL RISK ASSESSMENT: (CRA)

An assessment of an inmate's likelihood of violent and/or sexual re-offending based on review of specific risk indicators associated with recidivism. The CRA is a clinical summary of specific risk factors, interactions between factors and patterns of high-risk behaviors. The CRA is not a comprehensive psychological evaluation, nor is it to be used for the purpose of planning institutional mental health services.

C. CONFLICT OF INTEREST:

A condition arising whenever a parole board member or hearing officer determines that a personal relationship exists with any principal participant in a case which would impair (unreadable).

D. CONTINUED HEARING:

A subsequent release consideration on or about a date established by the parole board at a first hearing or at a previously continued hearing.

E. ELIGIBILITY DATE:

A date calculated pursuant to statute which indicates when an inmate can be considered for release.

F. FIRST HEARING:

A regular parole release consideration hearing calculated pursuant to Sections 2967.13, 2967.19, 2967.191, 2967.192 and 2967.193 of the Ohio Revised Code.

G. FULL BOARD HEARING:

A hearing conducted or case considered before at least a majority of the members of the parole board sitting together when the case meets the criteria for a full board hearing as prescribed in thi. policy or when the case is submitted to a full board hearing pursuant to Section 5149.101.

H. HEARING OFFICER INTERVIEW:

The portion of a hearing process wherein an inmate personally appears before one or more hearing officers who review and evaluate available information concerning the inmate's case and formulates a recommendation which is provided to a designated parole board member.



I. MAXIMUM EXPIRATION DATE:

The last day of a period of incarceration or community supervision which signifies that the maximum sentence imposed by the court has been served in its entirety.

J. PAROLE BOARD HEARING PANEL:

The body of the parole board designated by the parole board chair to conduct release consideration hearings. A panel shall consist of two or more members or one or more members and one or more hearing officers.

K. PAROLE BOARD MINUTES:

The official public record of the decisions of the parole board.

L. PAROLE ON OR AFTER (POA):

The earliest date upon which an inmate may be released on parole supervision. Given the individual requirements of each case, the actual release may be extended to any date after the POA date.

M. PAROLE ON OR BEFORE (POB):

The latest date upon which an inmate shall be released from custody. The. parole board establishes this date whenever a parolee is held in custody for an alleged parole violation and it is determined that the parolee is not guilty of the violation.

N. PAROLE PANEL HEARING:

A hearing wherein an inmate personally appears before a parole board hearing panel, either in person or via teleconferencing, for the purpose of the review and evaluation of available information and a determination as to whether to release the inmate to community supervision.

O. PRE-PAROLE MENTAL HEALTH TREATMENT SUMMARY

A summary of mental health care prepared by institutional mental health staff to assist in ensuring continuity of mental health care once the offender is released to the community.

P. PRE-RELEASE RECORD REVIEW:

A file review of an inmate's progress and institution conduct prior to the inmate's actual release.

Q. PROJECTED RELEASE DATE (PRD):

An action taken by the parole board to establish a future date of release not less than six months nor more than ten years from the date of hearing. Release on this date is based on the inmate complying with program and institution conduct requirements.

R. REVIEW PANEL:

Three parole board members, as designated by the parole board chair on a rotating basis, responsible to review certain parole board panel



decisions with authority to approve the panel decision or reject the panel decision and refer the case for further review.

S. RECOMMENDATION REVIEW:

The portion of a hearing process wherein a designated parole board member reviews the recommendation provided by a hearing officer or officers following a hearing officer interview.

T. RESCHEDULED HEARING:

An action taken by a parole board hearing panel or by a hearing officer to postpone a hearing to a future date whenever there is a need for additional information or clarification of existing information.

U. SHOCK PAROLE:

A release consideration for those inmates meeting the eligibility criteria provided in Section 2967.31 of the Ohio Revised Code and/or 5120:1-1-06 of the Administrative Code.

V. TRANSITIONAL CONTROL:

A release consideration for those inmates meeting the eligibility criteria provided in Section 2967.26 of the Revised Code or 5120-12-01 of the Administrative Code.

W. VIOLATION HEARING:

An administrative hearing conducted by a representative of the parole board or designee of

the chief of the Adult Parole Authority to determine whether an offender has violated one or more of the conditions of release and, if so, the specific sanction that should be imposed upon the offender.

## V. POLICY

The Ohio Parole Board will conduct hearings in a fair and consistent manner while recognizing the unique individuality of each offender. It shall operate in a professional, efficient manner, and will consider community consciousness, public safety and the interests of criminal justice in rendering its decisions. The Parole Board's procedures will utilize resources in an efficient manner, concentrating the members' attention on initial hearings, offense behaviors such as murder, rape and other acts of significant interpersonal violence and recommendations for or against the granting of clemency.

Decision-making involves the exercise of discretion. Unlimited discretion is to be eliminated. Necessary discretion is to be structured. Persons who are stakeholders in the decision-making process are notified pursuant to the Ohio Revised Code. Fairness and equality shall be the standards by which inmates, releasees, staff and the public are treated.

## VI. PROCEDURE

### A. Pre-Hearing Preparation:

In anticipation of parole board hearings, institutional record offices and/or unit management staff will:



1. Provide written notice to each inmate within 90 days of admission to an institution specifying the first legal eligibility date for a release hearing and maximum expiration of sentence.

2. During inmate orientation, provide a pamphlet and brief verbal explanation of the Ohio Parole Board guidelines, the process to request a reconsideration of the decision by the addition of new information, and the factors which are considered in a release decision by the board (Administrative Rule 5120:1-1-07). Interpreters should provide this information to non-English speaking and special needs offenders, as well as advise them that an interpreter may assist them at hearings.

3. Parole Board Parole Officers will be assigned to prepare case-specific information for hearings and interviews in a manner designated by the Parole Board Chair. Parole Officers may be assigned other duties as necessary to assist in coordinating Parole Board hearings, interviews and reviews.

4. Notify each inmate, in writing, at least 14 days in advance of any scheduled hearing before the Ohio Parole Board.

5. Make all notifications to judges and prosecutors within required time frames as specified in Section 2967.12 of the Ohio Revised Code. The Office of Victim Services shall provide notice of hearings to

qualified victims or victims' representatives.

B. Hearing Preparation:

1. The parole board chair schedules parole board members and hearing officers to conduct hearings or interviews based on the number of eligible inmates. These hearings or interviews should, to the extent administratively possible, be conducted 60 days prior to the inmate's month of release eligibility.

2. At each institution where hearings are conducted, the parole board chair designates, in advance, one parole board member to be responsible for assigning cases, determining which cases, if any, are subject to hearing officer interviews and coordinating logistics with institution staff.

C. Hearing/Interview Process:

1. All hearings shall be conducted in a setting which the parole board chair or designee believes will provide privacy, security, comfort, and a dignified atmosphere.

2. Attendance at parole hearings or interviews is limited to parole board staff, the inmate, and if required, special needs inmate's representative such as an interpreter, translator or a sign language specialist, or other persons authorized by the parole board chair or designee to observe the hearing process. When deemed appropriate



or necessary by the parole board staff present, security personnel may also be present in the hearing room. Unit management staff may provide input prior to the hearing.

3. Parole board members and hearing officers shall not participate in any aspect of the decision making process when a conflict of interest exists in a particular case. The parole board chair or designee should be informed of the employee's decision not to participate.

4. Except for full board hearings, each hearing or interview will be conducted with the inmate personally present or present via telecommunications, unless the parole board chair or designee determines for good cause shown that attendance by the inmate is inappropriate or unwarranted. Inmates refusing to appear before the parole board shall not be denied release based on this refusal. For the first such refusal, the case shall be rescheduled for sixty (60) days. Unit staff, in an attempt to determine the reasons for the refusal and to resolve the problem, shall interview the inmate. For any subsequent refusal to appear the hearing will be conducted without the inmate present. Reasons for conducting the hearing without the inmate present will be recorded on the parole board decision sheet.

5. Each interview or hearing will include a discussion or presentation to the inmate of the factual information upon which the

decision is to be based. This information shall include but is not limited to:

a. Brief details of the committing offense;

b. The offender's role when co-defendants are involved;

c. The offender's prior criminal record;

d. The offender's institutional record (disciplinary and rehabilitative); and

e. The parole board guidelines applicable to the inmate's case.

6. Each inmate is permitted to respond to the factual information provided at the hearing and submit any additional information either verbally or in writing, that the inmate feels is pertinent to the decision making process.

7. Confidential information shall not be released to the inmate, however inmates are informed if confidential information was considered. Confidential information includes:

   a. Responses from judges, prosecutors, victims and victim representatives;

   b. Information noted in official records as confidential or obtained under promise of anonymity;



   c. The pre-sentence investigation and recommendation as directed by Section 2951.03 of the Ohio Revised Code;

   d. Any information which could result in physical harm to any person or diagnostic or medical opinions which, if disclosed, could seriously disrupt rehabilitative programs, or any information deemed confidential by the hearing officer(s) or parole board member(s) conducting the hearing or interview.

8. Parole board staff should review case materials before the inmate is brought into the hearing room or prior to the initiation of a teleconferencing hearing, and are responsible for recording and preserving a summary of the major issues, statements and findings in the hearing or interview.

D. Decision Making:

1. Prior to making any release or denial recommendation or decision, hearing officers and parole board members:

   a. Shall consider those factors specified in Administrative Regulation 5120:1-1-07 (Appendix A);

   b. May consider those factors specified in Administrative Regulation 5120:1-1-07 (Appendix B);

   c. Shall review and consider the inmate's parole board guidelines; and

   d. Shall consider, for cases under the jurisdiction of the Interstate Compact Agreement on Parole, the parole resources of the receiving state and their ability to provide mandated conditions of release.

2. Any release consideration may be conducted as a parole panel hearing or be conducted as a hearing officer interview followed by a recommendation review.

3. Whether a case is to be decided through a panel hearing or a hearing officer interview followed by a recommendation review, the hearing officer(s) and parole board member(s) may;
   A. recommend, approve or deny the granting of parole, shock parole or transitional control



   B. recommend and approve the establishment of a projected release date or,
   C. continue consideration of specified cases to a future hearing date,
   D. continue cases to the maximum expiration date.

4. Hearing panels, whether a parole panel or when conducted as a hearing officer Interview followed by a recommendation review, shall make every effort possible to reach consensus as to the decision to be rendered. If, however, agreement cannot be achieved, the decision of the parole board member shall override the recommendation of the hearing officer, if such decision is consistent with the applicable parole board guideline range for the particular case. If agreement cannot be achieved and the decision of the parole board member constitutes a guideline departure the case will be referred to a review panel. The review panel shall review the information and the recommendations of the hearing panel members and render a decision in the case. The decision of the review panel shall be by majority vote of the three members and is not subject to further review unless the decision is subject to an automatic referral for central office board review or a full board open hearing is conducted following the acceptance of a petition.

5. When a decision is to be made through a hearing officer interview followed by a

recommendation review, the parole board member may do one of the following:

a. Approve the hearing officer's recommendation to release the inmate to parole or transitional control or establish a projected release date and may approve or modify the terms or conditions attached to the release or projected release recommendation;

b. Approve the hearing officer's recommendation to deny release and continue consideration of specified cases to a future hearing date or to the maximum expiration date

c. Reschedule the case for an appearance before a parole board hearing panel. If the recommendation review is being conducted on the same day and institution site as the hearing officer interview and the parole board member desires a panel hearing, the hearing, to the extent administratively possible, shall be conducted on the same day.

6. If any decision is to deny release and establish a projected release date, a future hearing date pursuant to the parole board guidelines, or continue the case to the maximum expiration date, the hearing panel, with agreement of all the hearing panel members, has the discretion to increase or decrease the applicable guideline range by one range without



further review. In establishing the projected release date, a future hearing date, or continuing the case to the maximum expiration date, any departure from the applicable guideline range greater than one range shall be referred for a review by the parole board chair or chair's designee. In establishing a future hearing date the length of continuance shall not exceed ten (10) years. Written reasons for any increase or decrease of the applicable guideline range shall be provided on the parole board decision sheet.

7. The parole board will give special attention to certain offenders and to certain offense categories to ensure public safety and public confidence in the release process.

a. If a parole board member is recommending the release of an inmate who is serving a sentence for any offense which carry a penalty of life imprisonment or any physically assaultive sex offense or any attempt, conspiracy or complicity to commit any of the above offenses or in any case receiving national or unusual state or local attention because of the nature of the crime, arrest, trial, or position in the community of the offender and/or the victim, the parole board member shall refer such inmate's case for a central office board review.

b. In any case where the offense(s) for

which the inmate has been committed to the institution resulted in serious bodily injury to the victim or is an offense under Chapter 2907 of the Revised Code (sex offenses), the parole board may request a clinical risk assessment (CRA) based on criteria developed by mental health services. Where the inmate's history or current treatment reflect that the inmate is or may be seriously mentally ill, the parole board may request pre-parole Mental Health treatment summary unless the parole board determines that this treatment summary would neither factor in the release decision nor assist the board in making a decision about appropriate conditions upon release. The pre-parole mental health treatment summary is completed by institutional mental health staff.

C. Programs within the institutions which help inmates to identify problem areas, deficiencies, compulsions, or addictions and which provide inmates alternatives to negative behaviors are important. Inmates in denial or those refusing to participate in programs designed to reduce or alleviate further criminal behavior, shall not be given favorable consideration for release, if, in the opinion of the parole board member(s) deciding their case, the inmate continues to present an



unacceptable risk of violent and assaultive conduct.

D. Appropriate conduct and adherence to institution rules and regulations are necessary for the orderly and safe operation of a correctional institution. Inmates who present an unacceptable risk to other inmates and staff represent an unacceptable risk to the community. Any inmate with a maximum security classification or any other classification title utilized to denote the most serious security risk inmates, at the time of release eligibility, shall not be granted release. A continued date shall be established which, to the extent possible, gives at least sufficient time for the inmate to be eligible for a security classification review which may lead to a security classification reduction. Release at any such projected release date shall be conditioned upon the inmate receiving a security classification less than maximum, or any other security classification title utilized to denote the most serious security risk inmates.

8. The parole board should not accept the presence of a detainer as an automatic bar to parole, nor should the board necessarily deny parole consideration to an offender who is a foreign national.

9. The decision will be provided to the inmate, both verbally and in writing, immediately following the hearing. Written reasons must be given for decisions. Decisions may be subject to a mandatory quality assurance review. Any corrected information, guideline changes or decision modifications resulting from a quality assurance review shall be provided to the inmate in writing or may result in a rehearing of the case. Decisions on hearings requiring further review should be made available as soon as administratively possible following the final decision.

10. When release is denied and/or a projected release date is established, the parole board will inform the inmate in writing of the month and year of his or her next release consideration or projected release date and the reasons for the decision.

11. A pre-release record review shall be conducted by a parole board hearing officer prior to the projected release date and the following shall be considered:
    A. change in security status
    B. institution rule infractions
    C. failure to comply with board mandated programs
    D. outstanding program achievement

    Inmates with significant institution rule infractions since the PRO was established may have the PRO rescinded and a new hearing ordered. At the rehearing the inmate may be assessed months for each significant violation which are to be added to the original PRD.



Inmates with improved security status and/or outstanding program achievement since the PRO was established may have the PRO rescinded and a new hearing ordered. At the rehearing the inmate may be credited with additional months and an earlier PRD established.

Inmates meeting the eligibility criteria for transitional control may have the original PRO approved and be granted release to transitional control for a period of up to six months prior to the original PRO.

12. Once a decision has been finalized, including any mandatory review as specified in the quality assurance review policy, notification of the decision shall be provided to requesting victims and/or victim representatives pursuant to ORC 2930.16(C)(1).

13. Parole board minutes are considered public information once certified by the parole board chairperson.

## APPENDIX A

## FACTORS THAT *WILL* BE CONSIDERED IN MAKING RELEASE DECISIONS

Any reports prepared by any institutional staff member relating to the inmate's personality, social history and adjustment to institutional programs and assignments.

Any official report of the inmate's prior criminal record, including a report or record of earlier probation or parole.

Any presentence/post sentence report.

Any recommendations regarding the inmate's release made at the time of sentencing or at any time thereafter by the sentencing judge, presiding judge, prosecuting attorney or defense counsel.

Any reports of physical, mental or psychiatric examination of inmate.

Such other relevant written information concerning the inmate as may be reasonably available, except that no document related to the filing of a grievance under Rule 51 20:9-31 of the Administrative Code shall be considered.

Written or oral statements by the inmate, other than grievances filed under Rule 51 20:9-31 of the Administrative Code.



## APPENDIX B

## FACTORS THAT *MAY* BE CONSIDERED IN MAKING RELEASE DECISIONS

The inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's own goals and needs.

The inmate's family status, including whether his/her relatives display an interest in the inmate or whether he/she has other close and constructive associations in the community.

The type of residence, neighborhood, or community in which the inmate plans to live.

The inmate's employment history and his/her occupational skills.

The inmate's vocational, educational and other training.

The adequacy of the inmate's plan or prospects on release.

Any recommendations made by the Sentencing Court.

The inmate's conduct during his term of imprisonment.

The inmate's behavior and attitude during any previous experience of probation, furlough, parole, or other administrative release, and recency of such experience. The availability of community resources to assist the inmate.

The nature of the offense for which the inmate was convicted.

The inmate's pattern of criminal or delinquent behavior prior

to the current term of imprisonment.

The physical and mental health of the inmate as they reflect upon the inmate's ability to perform his/her plan of release.

The presence of outstanding detainers against an inmate.

Any recommendations made by the staff of the Department of Rehabilitation and Correction or any of its agencies.

Any other factors which the board determines relevant, except for documents related to the filing of a grievance under Rule 5120:9-31 of the Administrative Code.

DRC 1362



# Supermax Prisons: Overview and General Considerations

by

Chase Riveland

January 1999

This document was developed under Technical Assistance #98P4002 from the National Institute of Corrections, U.S. Department of Justice. Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position or policies of the U. S. Department of Justice.

## [8] Section 4. Operational Issues

Many management and operational issues gain heightened importance in extended control facilities. Some of these are:

- The criteria by which inmates are admitted to or excluded from the facilities,
- How inmates are managed,
- The services they are provided,
- The manner in which they are expected to behave,
- The amount of human contact they have,
- The allowable use of force and control of the use of force,
- The criteria and process for release from extended control.

The potential for abuse in an environment that prioritizes control of human beings, who by definition or in reality are the "worst of the worst," can be mitigated by thoughtful attention to the manner in which such facilities are operated.

The agency and facility mission and objectives, which include humane treatment, reduction of anger and violence, and reintegration into general population, should be clearly stated and affirmed in operations, programs, and staff training. The agency planning to operate such a facility, or evaluating its existing operation, should recognize the critical



importance of the extended control mission and operational practices, including those discussed next.

**Classification**

Most prison classification systems have evolved over the last two decades from very subjective means of classifying inmates to relatively objective systems. This move toward objectivity has occurred mainly to avoid unbridled discretion and to incorporate into classification instruments the philosophical and policy preferences significant to the agency.

Typically the classification process will allow for the orderly determination of the level of custody an inmate requires, based on criminal and behavioral history; the medical, psychological, and programmatic needs and limitations of the inmate; and the type of institution that can best meet those considerations. Objective classification systems have not only helped correctional agencies defend their placement decisions when challenged, but have helped them attempt to place individuals in the least-restrictive facility—and therefore presumably the least costly. Objective classification systems also generally provide inmates with a known path for moving to less secure facilities and incentives for behaving appropriately, working, and pursuing improvement programs.

It is therefore wise for agencies that are operating or planning to operate extended control facilities to assure that the process for identifying inmates for placement there is at least consistent with and preferably an integral part of the agency's classification process. This will probably assist in legal defense of the placements as well as help avoid the overuse—or inappropriate use—of very expensive housing. Inherent in using the classification process to determine an inmate's eligibility for extended control is that the criteria for

admission are clearly articulated, non-ambiguous, and consistent with the agency's disciplinary process.

Many agencies operate under administrative rule or policy that provides a mechanism and authorization for placement of an inmate in administrative confinement or segregation when he/she is deemed to be a threat to the safety, security, or orderly operation of the institution. This is often a non-disciplinary status—that is, the placement is not a penalty with a determinate time affixed to it, but is based on a pattern or history of dangerousness or unconfirmed but reliable evidence of pending disruption.

With the advent of extended control facilities and specific criteria for placement, agencies should carefully consider what impact the need or requirement to provide objective or behaviorally based criteria for admission there would have on administrative segregation decisions. In many agencies, administrative segregation of an inmate who may be a threat to safety, security, or order is an approved remedy without application of objective criteria or verified misconduct. Wardens peri-[9]odically invoke this procedure as a preventative or protective measure based on strong belief that an inmate's continued presence in the general population may create a threat to safety and security. Following periodic reviews, segregation of such inmates may then be continued, despite exemplary behavior in segregation, because of the strong belief that the inmate's violent proclivities and/or intentions to harm others or threaten security of the facility when given the opportunity remain unchanged.

Hans Toch and Kenneth Adams, in *The Disturbed Violent Offender*, discuss the management of offenders who are viewed as having mental health deficiencies and who are violent. They differentiate between the *disturbed* violent offender and the disturbed *violent* offender. Herein lies one of the numerous classification difficulties related to the



protection of others by segregation of offenders with a history and potential of violence. Diagnosis, prediction, risk assessment, and identification of causal factors to violent acting out often defy objective criteria and invite a significant degree of subjectivity. Prison administrators should be cognizant of that difficulty in defining admission, release, and length of stay criteria.

Once an inmate is placed in an extended control facility, specific classification review periods are advisable, either chronological or event-driven, or both. The reviews should provide the inmate with the opportunity to offer information that would lead to consideration of a reduced custody placement and to be informed of the conditions that must be met for such consideration.

It would be prudent to have the final authority for approving admission to, retention in, and release from an extended control facility rest at the highest levels of the organization. This would preclude—or minimize— potential abuse of the policy criteria for admission and release and also raise the level of organizational consciousness of the seriousness of such placements.

## Programming

Decisions on what types of programming to provide and how should be well thought out. Obviously the more programs available to the inmates, the less vulnerable the facility will be to legal challenge and the more likely that inmates' negative reaction to isolation will be ameliorated. Programming for this purpose includes education, work opportunities, exercise, and various other programs aimed at improving the inmates' behavior, knowledge, or skills.

*It would be prudent to have the final authority for approving*

*admission to, retention in, and release from extended control rest at the highest levels of the organization.*

Education is provided in a variety of ways in extended control facilities around the country. Some agencies allow television in the cells and provide education or self-help programs through intra-institution cable. Some supplement this with instructors providing assistance through cell-front visits. Others allow small congregate classes in day rooms or special rooms in close proximity to the housing units. Some provide no educational programs at all.

Most allow no work activities, although they might provide some work opportunities in transition programs for inmates being prepared to leave the extended control environment.

Exercise in most extended control facilities is limited to three to seven hours (in one-hour intervals) per week, generally in an indoor space or small, secure, attached outdoor space. Usually exercise is provided to one inmate at a time and the inmate is escorted in restraints by two or more correctional officers to and from the exercise space. Congregate exercise occurs only in transition programs provided in some facilities.

Agencies evaluating their extended control facilities or planning new ones should pay close attention to exercise and how they provide it. It is a critical issue not only because of the human, health, and legal issues it presents, but for the staffing cost and security implications. The number of staff required to move each inmate from a cell to the exercise space and back three to seven times each week is considerable. As these events also constitute the most frequent time that the inmate is out of his/her cell, they also present the most likely opportunity for resistive or combative behavior or the exchange or introduction of contraband



Most other types of programming offered in extended control facilities, such as substance abuse treatment, anger management, and vocational training, are provided only through television, correspondence, or

## BRIEF SUMMARY OF INMATE PROFILES

The profiles of the inmates who were approved for transfer to the Ohio State Penitentiary are based on all 246 inmates who had been transferred by the end of November 1998.

Since there is no master list of inmates who were recommended for transfer to OSP but who were rejected for transfer, the profiles are based on a non-random sample of inmates who were known to have been recommended and disapproved and whose names happened to be available.

Because of the way in which inmates were originally recommended for transfer to OSP (from Death Row and MANCI and A.C. at SOCF), these first transfers are probably not representative of the inmates who will be recommended and approved for transfer in the future. Therefore, not too much should be read into these data.

There are a few interesting points about these profiles:

- There does not appear to be a difference between accepted and rejected inmates on the basis of race, age, percentage of their aggregate minimum sentence already served, or whether the inmates was in a special management status at time of recommendation.

- Inmates whose transfer to OSP was approved tend to be more likely to have been convicted of aggravated murder or murder and to have had an additional conviction (generally for aggravated murder, murder or some degree of assault) while in prison. Both



groups are overwhelmingly likely to have originally been convicted of a violent offense: 100% of the rejected group and 96.8% of the accepted group.

- The majority of the inmates accepted for transfer were deemed appropriate for OSP because of patterns of violence and/or extremely serious assaults, particularly assaults involving the use of a weapon. Other reasons included conveying drugs or other contraband into an institution, holding a leadership or enforcement position in a security threat group, or constituting a serious escape risk. In two cases, we were unable to determine from the inmate's file why his transfer to OSP was approved. **Overall, it does appear that the inmates approved for transfer through the end of November do in fact meet the criteria set forth in DRC policy 111-07.**

- The reasons cited for denying transfer generally were that the inmate was in fact seriously mentally ill or the alleged assault was not serious (i.e., no injury was reported) or the behavior did not constitute a pattern of assault. **As with the accepted inmates, it appears that the rejection of these inmates for transfer to OSP is in line with departmental policy.**

- Comparing the transferred and rejected groups in terms of the identity of their assault victims shows that both groups are much more likely to have assaulted CO's or other staff members than other inmates, although the group transferred to OSP is somewhat more likely than the rejected group to have seriously assaulted another inmate. There is no difference between the groups in terms of their likelihood of assaulting a female staff member.

TABLE 7:

AC STATUS AT TIME OF TRANSFER

| | | Frequency | Percent |
|---|---|---|---|
| Sent | | | |
| | Not in AC | 48 | 20.0 |
| | In AC | 192 | 80.0 |
| | Total | 240 | 100.0 |
| | Missing | 1 | |
| Not Sent | | | |
| | Not in AC | 12 | 28.6 |
| | Sent In AC | 30 | 71.4 |
| | Total | 42 | 100.0 |
| | Missing | 1 | |

* * *

TABLE 9:
SECURITY LEVEL AT TIME OF TRANSFER TO OSP

| | | Frequency | Percent |
|---|---|---|---|
| Sent | Max 4 | 213 | 89.5 |
| | Close 3 | 22 | 9.2 |
| | Med 3 | 2 | .8 |
| | Min 2 | 1 | .4 |
| | Total | 238 | 100.0 |
| | Missing | 3 | |
| Not Sent | Max 4 | 43 | 100.0 |

* * *



TABLE 12:
REASONS OFFENDERS SENT TO OSP

| | Frequency | Percent |
|---|---|---|
| Assault | 79 | 32.8 |
| Pattern of Violence | 57 | 23.7 |
| Riot Related | 30 | 12.4 |
| Drugs | 27 | 11.2 |
| Security Threat Group Member | 13 | 5.4 |
| Multiple reasons | 12 | 5.0 |
| Threats/Extortion | 9 | 3.7 |
| Escape Risk | 6 | 2.5 |
| Arson | 5 | 2.1 |
| Weapons | 2 | .8 |
| Obscene/Seductive | 1 | .4 |
| Total | 241 | 100.0 |

* * *

TABLE 16: ASSAULT TYPE

| | | Frequency | Percent |
|---|---|---|---|
| Sent | Attempt | 2 | 3.9 |
| | Weapon | 25 | 49.0 |
| | Spitting/Flinging | 1 | 2.0 |
| | Body (fists, feet, etc) | 21 | 41.2 |
| | Attempt throw off range | 2 | 3.9 |
| | Total | 51 | 100.0. |
| | Missing | 28 | |
| Not Sent | Attempt | 2 | 16.7 |
| | Weapon | 2 | 16.7 |
| | Spitting/Flinging | 2 | 16.7 |
| | Body (fists, feet, etc.) | 6 | 50. |
| | Total | 12 | 100. |
| | Missing | 3 | |

**Plaintiff's Exhibit Austin-5**
**4:01cv071**

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED
99 DEC – 1 AM 8:39
JAMES L. SPAETH
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY
IN THE COURT OF COMMON PLEAS

STATE OF OHIO, ) SEPTEMBER TERM, 1999
Plaintiff, )
)CASE NO. 99CR18314
-vs- )
)VERDICT-NOT GUILTY
CHARLES AUSTIN, ) COUNT 1
)
Defendant. ) *318-205*

---

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant CHARLES AUSTIN NOT GUILTY OF FELONIOUS ASSAULT.
November 30, 1999

1. /s/ Dan Ward
2. /s/ Annabelle Downing
3. /s/ Deborah Stephenson
4. /s/ Sarah J. Gamnion
5. /s/ Mary Lee McCormick
6. /s/ Jennifer Bacevich
7. /s/ Bonnie Butler
8. /s/ Nancy Fields
9. /s/ Karen Sebright
10. /s/ Darlene Hicks
11. /s/ Clarine Arby
12. /s/ Jerry Wartham

WARREN COUNTY



COMMON PLEAS COURT
JUDGE P. DANIEL FEDDERS
JUDGE NEAL B. BRONSON
500 JUSTICE DRIVE
LEBANON, OHIO 45036

CERTIFIED COPY
JAMES L. SPAETH, CLERK
WARRANT COUNTY, OHIO
COMMON PLEAS COURT
BY /s/ James L. Spaeth / Clerk
~~DEPUTY~~

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED
99 DEC – 1 AM 8:39
JAMES L. SPAETH
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY
IN THE COURT OF COMMON PLEAS

| | |
|---|---|
| STATE OF OHIO, | ) |
| | ) SEPTEMBER TERM, 1999 |
| | ) |
| Plaintiff, | ) |
| | ) CASE NO. 99CR18314 |
| -vs- | ) |
| | ) VERDICT-NOT GUILTY |
| CHARLES AUSTIN, | ) COUNT 2 |
| | ) |
| Defendant. | ) |

*318-206*

---

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant CHARLES AUSTIN NOT GUILTY OF POSSESSION OF DEADLY WEAPON WHILE UNDER DETENTION.
November 30, 1999

1. /s/ Dan Ward
2. /s/ Annabelle Downing
3. /s/ Deborah Stephenson
4. /s/ Sarah J. Gamnion
5. /s/ Mary Lee McCormick
6. /s/ Jennifer Bacevich
7. /s/ Bonnie Butler
8. /s/ Nancy Fields
9. /s/Karen Sebright
10. /s/ Darlene Hicks
11. /s/ Clarine Arby
12. /s/ Jerry Wartham

WARREN COUNTY



COMMON PLEAS COURT
JUDGE P. DANIEL FEDDERS
JUDGE NEAL B. BRONSON
500 JUSTICE DRIVE
LEBANON, OHIO 45036

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JAMES L. SPAETH, CLERK
WARRANT COUNTY, OHIO
COMMON PLEAS COURT
BY /s/ James L. Spaeth / Clerk
~~DEPUTY~~

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99 DEC – 1 AM 3:14
JAMES L. SPAETH
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY
IN THE COURT OF COMMON PLEAS

| | |
|---|---|
| STATE OF OHIO, | ) SEPTEMBER TERM, 1999 |
| Plaintiff, | ) |
| | ) CASE NO. 99CR18314 |
| -vs- | ) |
| | ) ENTRY |
| CHARLES AUSTIN, | ) |
| Defendant. | ) |

*318-207*

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This cause came on for Trial on November 29 & 30, 1999. The Jury, having heard the evidence and arguments of counsel found the Defendant, CHARLES AUSTIN, **NOT GUILTY**, and the defendant was so informed.

It is therefore, CONSIDERED, ORDERED, and DECREED that Judgment be, and the same is hereby entered in favor of the Defendant.

/s/ P. Daniel Fedder
JUDGE, COMMON PLEAS COURT

Distribution:
Prosecutor's Office
Mr. Jeffrey Kirby

CERTIFIED COPY
JAMES L. SPAETH, CLERK
WARRANT COUNTY, OHIO
COMMON PLEAS COURT
BY /s/ James L. Spaeth / Clerk
~~DEPUTY~~



BY: /s/James L. Spaeth/Clerk
~~DEPUTY~~

**Plaintiff's Exhibit Austin-8**
**4:01cv071**

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

(seal)

1050 Freeway Drive North
Columbus, Ohio 43229

Bob Taft, Governor — Reginald A. Wilkinson, Director
www.drc.state.oh.us

February 24, 2000

Charles Austin 206-996
Ohio State Penitentiary
878 Coitsville Hubbard Road
Youngstown OH 44505

Dear Mr. Austin:

Thank you for your letter dated February 15, 2000 regarding your status at the Ohio State Penitentiary (OSP).

The verdict of an outside court case does not affect the findings of the internal rules infraction board nor the classification action which prompted your placement at OSP. Therefore, your status will remain at high maximum until such time as you are recommended for reduction.

If you have any additional questions, please do not hesitate to contact this office.

Sincerely,

*/s/* Norm F. Hills



Norm F. Hills
North Regional Director
cc: Warden Dave Johnson
File

**Plaintiff's Exhibit Benge-9**
**4:01cv071**

SEAL Ohio Department of Rehabilitation And Correction

Ohio State Penitentiary
P.O. Box 1436
Youngstown, Ohio 44501

Bob Taft, Governor Reginald A. Wilkinson, Director
www.drc.state.oh.us

TO: Michael Benge
#276-821
FROM: Warden Johnson, OSP */s/*
DATE: February 9, 2000
SUBJECT: Re-Appeal of Recommendation for High Maximum Security Appeal

I have reviewed your appeal of the Classification Committee action conducted on 1/04/00. I find no procedural errors in this hearing, and I affirm the decision of the Committee that you continue to represent the highest level of threat to the security of our institutions. Only continued cooperation and participation in programs will result in you being viewed as less of a threat.

I find no procedural errors, and I agree with the committee that your current security level is appropriate.

You may further appeal this decision to the Bureau of Classification in Columbus, Ohio.

cc: Unit file
*Received 2-11-00*



**Plaintiff's Exhibit Benge-15**
**4:01cv071**

SEAL Ohio Department Of Rehabilitation And Correction
Ohio State Penitentiary
P.O. Box 1436
Youngstown, Ohio 44501

Bob Taft, Governor Reginald A. Wilkinson, Director
www.drc.state.oh.us

March 12, 2001

Michael Benge, # 276-821
Ohio State Penitentiary
878 Coitsville Hubbard Road
Youngstown OH 44505

Dear Mr. Benge:

Thank you for your recent letter of appeal to the recommendation that you be continued at high-maximum security at The Ohio State Penitentiary. According to my records, you were seen by the Review Committee on January 8, 2001.

The information you provided and your records have been reviewed in accordance with AR 5120-9-53 and DRC Policy 111-07. The recommendation of the Bureau of Classification is affirmed and it is the decision of this writer to approve your continuance at high maximum security. there is no further appeal available to you in this matter. You will be seen again by the review committee during the month of January, 2002.

If you have any additional questions, please do not hesitate to contact this office.

Sincerely,

/s/ Stephen J. Huffman

Stephen J. Huffman
North Regional Director

cc: Warden Todd Ishee
Bernard Ryznar
File

(Rev. 3-2001)



**Plaintiff's Exhibit DeJarnette-2**
**4:01cv071**

TO: Alan J. Lazaroff, Warden
Orient Correctional Institution
/s/ R.E. Forrest

FROM: R.E. Forrest, Deputy Warden of Operations
Orient Correctional Institution

SUBJECT: High-Max Review
RE: Dejarnette 275-295

In accordance with ODR&C policy 111-07 (High Maximum Security, I chaired a review committee specific to the above named inmate for possible placement to High Maximum Security. The committee members were R.E. Forrest (Deputy Warden of Operations), M. Miller (Deputy Warden of Special Services) and H. Eisel (Psychologist).

After review of the inmate's behavior record and consideration of his response during the committee's interview of him, the committee unanimously that placement of this man to High Maximum Security is not appropriate. the committee agrees that the inmate's behavior warrants placement into a strictly controlled environment and suggests that this man be considered for placement in Administrative control.

Submitted for your action and/or disposition.

9/18/98
Recommend Admin. Control
/s/ Alan J. Lazaroff

**Plaintiff's Exhibit DeJarnette-3**
**4:01cv071**

SEAL Ohio Department of Rehabilitation and Correction
1050 Freeway Drive North
Columbus, Ohio 43229

George V. Voinovich, Governor — Reginald A. Wilkinson, Director

| MODIFICATION OF TRANSFER | Date: 9/21/98 |
|---|---|
| To: Bernie Ryznar, Chief, Classification | From: Alan J. Lazaroff, Warden |
| Subject: A275-295, DeJarnette, James (B) Max | |

We are requesting authorization to transfer the above named inmate(s) from the

Orient Correctional Institution to the Administrative Control

for the following reason(s):

On 8/30/98 Inmate DeJarnette committed a Class II, Rule 19 involving assaults on an OCI Captain, Sergeant, and Correction Officer resulting in injuries to these staff. due to his conduct and his past RIB history, we are requesting a transfer to Administrative Control.

NATURE OF TRANSFER:

☐ Disciplinary ☐ Medical ☐ Will be/has been on transfer ticket
☒ Administrative ☐ Psychiatric ☐ Other

Warden's Signature:



/s/Alan J. Lazaroff Alan J. Lazaroff, Warden

DEPARTMENTAL ACTION

☒ Request approved in accordance with:

☐ Section 5120.14 R.C. ☐ Section 5120.16 R.C.
☐ Section 2967.20 R.C. ☐ Section 5143.09 R.C.
☐ A.R. 5120-9-21 ☐ Other: _____

☒ Request Denied.

OSP High Maximum Security

~~FT SOCF AC~~

Request Amended:

*TO SOUTHERN OHIO CORRECTIONAL FACILITY AC
*TRANSFER MODIFIED TO OHIO STATE PENITENTIARY (HIGH MAX SECUTRITY) ON 10/19/98 PER MARVIN NASH

By:
/s/Bernie Ryznar

DRC 2003 (REV 11/95)

**Plaintiff's Exhibit DeJarnette-5**
**4:01cv071**

RECEIVED
99APR-2 PM 1:59
(ILLEGIBLE)
SHERIFF
PICKAWAY COUNTY

IN THE COURT OF COMMON PLEAS
PICKAWAY COUNTY, OHIO

FILED—COMM PLEAS

State of Ohio,

Plaintiff,

v.

James Dejarnette,

Case No. 98 CR 167
Judge Knece

99APR-2 AM 11:14
(ILLEGIBLE) K. CLINE
CLERK OF COURTS
PICKAWAY COUNTY

ENTRY OF VOLUNTARY DISMISSAL

This matter comes before the Court, *sua sponte*, on the 2nd day of April, 1999, upon the Motion of the Prosecuting Attorney to dismiss the above-captioned matter pursuant to Criminal Rule 48(A).

Pursuant to the Motion, and for good cause shown, the Court hereby grants leave to dismiss this matter, and the same is hereby ORDERED DISMISSED. The trial date currently set in this matter for Monday, April 5, 1999 is hereby VACATED.

It is the further ORDER of the Court that the costs be waived.

/s/P. Randall Knece
P. RANDALL KNECE, JUDGE
Date 4-2-99



**Plaintiff's Exhibit DeJarnette-9**
**4:01cv071**

**Ohio Parole Board Decision**

| Name: James DeJarnette | Inmate No.: A275295 | | Date: 8/21/00 |
|---|---|---|---|
| Hearing Type: Rehear | Security Level: HIGH MAX | Sentence: 3A1 3-15 YRS | MAX/EDS/EST: (circle one) 12 18-2010 |

1. The (offense) (parole violation) behavior has been rated as Category 7 because the offense behavior involved (Circle appropriate behavior):

12/21/92—Inmate & (2) Co-defendants robbed Super America at gunpoint. (Sawed off-12 guage shotgun—Upon arrest $52.00 & loaded weapon found in co-def car/Inmate found in poss. of $405.15.

Section No.(s): 321c

2. The Criminal History/Risk Score is 1.

3. The Guideline Range is 48-60 months.

4. Time served 88 mos. + JTC 4 mos = Total Time Served 92 mos. TPV Arrest Date: ---

5. Check if non-applicable ☒. The inmate has committed new felony criminal conduct in a prison facility that is rated as Category ~~1~~—because it involved: ~~8/30/98—Inmate assaulted Staff member at OCI (hit staff member in the face w/his hand)~~ Section No.(s): ~~213A~~

The Rescission Criminal History/Risk Score is **4**. (Considered at 6/99 (illegible))
This conduct requires ~~10-16~~ months to be added to the guideline range.

6. Check if non-applicable ☒.

A. The inmate has committed _____ disciplinary infractions involving non-felonious threatening conduct against staff and/or non-felonious possession of a dangerous instrument (6-12 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

B. The inmate has committed _____ disciplinary infractions involving possession or use of alcohol and/or possession or use of a controlled substance other than possession of a controlled substance with intent to distribute (3-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

C. The inmate has committed _____ disciplinary infractions involving other misdemeanor conduct (0-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

D. The inmate has committed _____ other significant disciplinary infractions (0-2 months per infraction to be added to the guideline range) that occurred on the following dates:

_____



This conduct requires _____ months to be added to the guideline range.

| Name: | Inmate No.: | Date: |
|---|---|---|
| JAMES DEJARNETTE | A275295 | 8/21/00 |

7. Check if non-applicable ☐. the aggregate guideline range is _____ months.

8. After review of all relevant factors and information presented:

☐ A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range.

☒ B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

☐ C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:

☐ (1) The inmate's offense behavior involved the following specific (aggravating) (mitigating) factors:

☐ (2) The inmate is a (poorer) (more serious) (better) risk than indicated by his/her criminal history score for the following specific reasons:

☐ (3) Other specific reasons:

List number of guideline ranges departed:
Vertical _____ Horizontal _____

List selected guideline range: _____ months.

Inmate serving 1st Adult Commitment—He is currently High Max Security—with next Security Screening 12/2000. He has served above the recommended range—However his Security Status prevents a release recommendation (illegible) (illegible) to get inmate to earliest appointment for reduction to close. (Project 4)

*Requiring 19 added mons to serve until next (illegible) eligibility.

9. Total time to be served 111 months.

10. Optional Outstanding Program Achievement
(Note: the granting or denying of such credit is discretionary.)

☐ granted ☒ not granted

The Board's decision includes a _____ month credit for outstanding program achievement as specified below:

---

11. Adjusted total time to be served _____ months.

12. Recommendation: Continue 3/2002

13. Institutional conditions prior to PRD or next hearing:

---

14. Hearing Panel:

| Board Member: /s/(illegible) | Hearing Officer: /s/(illegible) |
|---|---|

**Release on PRD is contingent on good institution behavior and/or reduction from maximum security status. A PRD may be extended for a Class II violation**



**when the case is reviewed at the PRD Pre-Release Review.**

DRC 3331 (7/99)

**Plaintiff's Exhibit DeJarnette-11**
**4:01cv071**

Ohio Department of Rehabilitation and Correction
High Maximum Security Classification Review

| Name: DEJARNETTE, JAMES | | Number: A275295 |
|---|---|---|
| Lock: (illegible) | High Max Level: Level 3 | Institution: OSP |
| Date of Current Placement: 10-21-98 | Sending Institution: OCI | |

Justification for High Maximum Security Classification: 09-02-98 RIB (illegible) (12, R19 (Assault) Hit a sergeant in the face. Assaulted a captain and officer.

Adjustment while in High Maximum Security Classification: Good adjustment—not a behavioral problem.

Inmate comments at time of hearing: Has done everything he could to drop his status.

High Maximum Security Classification Committee Action

- ☐ Retain in high Maximum Security Classification
- ☒ Recommend release from High Maximum Security Classification
- ☐ Other: _____



Justification for Action Taken

- ☐ Based upon this inmate's assaultive, predatory, or other dangerous conduct, he/she continues to require placement in a high max security classification.
- ☐ there is a likelihood that if released, the inmate would continue to demonstrate aggressive, disruptive and or predatory behavior.
- ☒ Based upon the inmate's adjustment while in high maximum security, inmate no longer represents department's highest level of threat to security and order, and is appropriate for security reduction.
- ☐ Other: _____

Comments: Good adjustment . Level III.

| Date of Next Review: | |
|---|---|
| Warden's Designee's (Deputy Warden) Signature: /s/Carolyn Hennel | Date: 11/28/00 |
| Warden's Designee's (Mental Health Professional) Signature: /s/(illegible) | Date: 11/28/00 |
| North Regional Director's Designee's Signature: /s/Roberta W. Banks | Date: 11/28/00 |

| Warden's Recommendation | Warden's Signature: | Date: |
|---|---|---|
| ☐ Recommend Approval<br>☒ Recommend Denial | (illegible) | 12-6-00 |

Comments: Serious assault—still represents the highest risk of threat to ODRC (illegible) Continue high maximum classification.

| Chief, Bureau of Classification | Chief Signature: | Date: |
|---|---|---|

Review

☐Recommend Approval
☒Recommend Denial

| | |
|---|---|
| /s/Bernard Ryzner | 12/19/00 |

Comments: Hit sgt. in face, (illegible), swollen eye to C/O from head butt and (illegible).

Regional Director's Approval Required for Releases

☐Release Approved
☒Release Denied

| | |
|---|---|
| Regional Director Signature: /s/Stephen J. Huffman | Date: 12/20/00 |

Comments:_____



**Plaintiff's Exhibit Gardner-1A**
**4:01cv071**

SCIOTO COUNTY
OHIO
FILED

98 DEC –9 AM 8:33
(ILLEGIBLE)
CLERK OF COURTS

VERDICT—Single Form
Instruction 413.50

Court of Common Pleas, Scioto County, Ohio
December 8 Term, 1998

THE STATE OF OHIO

vs. No. 98-CR-182

KEITH GARDINER

Indictment For
POSSESSION OF A DEADLY WEAPON WHILE UNDER DETENTION

We, the Jury, find the Defendant ___* NOT GUILTY of Possession of a Deadly Weapon While Under Detention

Dated December 8, 1998.

1 /s/Patricia Schmidt
2 /s/Debra L. Smith
3 /s/Mary Taylor
4 /s/Jason Taylor
5 /s/Aaron Jackson
7 /s/David Zinker
8 /s/Robert Cooley
9 /s/Patricia Williams
10 /s/Jack D. Young
11 /s/Ruth Jarvis

6 /s/Christopher Gampp
*Insert In Ink: Guilty or
Not Guilty

12 Kim Donnally

Jack D. Young FOREMAN



**Plaintiff's Exhibit Gardner-1B**
**4:01cv071**

SCIOTO COUNTY
OHIO
FILED

(ILLEGIBLE) DEC. 11 AM 9:37
(ILLEGIBLE)
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS,
SCIOTO COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO — NO: 98-CR-182

Plaintiff JUDGE: HARCHA, III

vs.

KEITH GARDINER — CHARGE: Poss. Dead. Weapon

Defendant

JUDGMENT ENTRY

This day, December 7, 1998, came the Prosecuting Attorney on behalf of the State of Ohio, and the defendant, Keith Gardiner, in open court and with counsel. Also came the following named persons as jurors, to-wit:

1. Aaron Jackson
2. Kimberly Donnally
3. Debra Smith
4. Christopher Gampp
5. Jason Taylor
6. Ruth Jarvis
7. Robert Cooley
8. Patricia Schmidt
9. Mary E. Taylor
10. David Zinker
11. Patricia Williams
12. Jack Young

who were duly impaneled and sworn, and having heard the evidence presented, the arguements of counsel and the charge of the court, retired to their room to deliberate on the verdict. And afterward came the Jury and returned the following verdict concurred in by all the Jurors, to-wit: "We, the Jury, find the Defendant NOT GUILTY of Possession of a Deadly Weapon while under Detention."

Dated December 8, 1998.

1. Aaron Jackson
2. Kimberly Donnally
3. Debra Smith
4. Christopher Gampp
5. Jason Taylor
6. Ruth Jarvis
7. Robert Cooley
8. Patricia Schmidt
9. Mary E. Taylor
10. David Zinker
11. Patricia Williams
12. Jack Young

*Insert in Ink: Guilty or Not Guilty

This matter is dismissed.

Enter:

/s/Howard H. Harcha, III
JUDGE HOWARD H. HARCHA, III

/s/Lynn Alan Grimshaw
Lynn Alan Grimshaw (0032292)
Prosecuting Attorney

---

Michael Mearan
Attorney for the Defendant



**Plaintiff's Exhibit Gardner-1C**
**4:01cv071**

OSP RECORDS
DEC 30 1998
RECEIVED

The outcome of an outside court case has no bearing on an RIB hearing.

R. Millhouse
12-14-98

(illegible note at bottom)

**Plaintiff's Exhibit Gardner-3**
**4:01cv071**

Ohio Department of Rehabilitation and Correction
High Maximum Security Classification Review

| Name: GARDINER, KEITH | | Number: A149-278 |
|---|---|---|
| Lock: B7-21 | High Max Level: 2 | Institution: OSP |
| Date of Current Placement: 11-21-98 | Sending Institution: SOCF A/C VIA MANCI | |

Justification ~~for High~~ Maximum Security Classification: Extorted inmate for Sex (95) stabbing of another inmate (served A/C time)

Adjustment while in High Maximum Security Classification: Good

Inmate comments at time of hearing: Did not commit an act to be sent to OSP

High Maximum Security Classification Committee Action

- ☐ Retain in high Maximum Security Classification
- ☒ Recommend release from High Maximum Security Classification
- ☐ Other: _____



Justification for Action Taken

- ☐ Based upon this inmate's assaultive, predatory, or other dangerous conduct, he/she continues to require placement in a high max security classification.
- ☐ there is a likelihood that if released, the inmate would continue to demonstrate aggressive, disruptive and or predatory behavior.
- ☒ Based upon the inmate's adjustment while in high maximum security, inmate no longer represents department's highest level of threat to security and order, and is appropriate for security reduction.
- ☐ Other: _____

Comments: Placement to OSP Questionable. No recent disciplinary after A/C release 1/98

| Date of Next Review: | |
|---|---|
| Warden's Designee's (Deputy Warden) Signature: /s/David Bobby (illegible) | Date: 1-13-00 |
| Warden's Designee's (Mental Health Professional) Signature: /s/(illegible) | Date: 1/13/00 |
| North Regional Director's Designee's Signature: /s/(illegible) | Date: 1/13/00 |

| Warden's Recommendation | Warden's Signature: | Date: |
|---|---|---|
| ☒ Recommend Approval<br>☐ Recommend Denial | (illegible) | 2-8-00 |

Comments: _____

| Chief, Bureau of Classification | Chief Signature: | Date: |
|---|---|---|

Review:

☐Recommend Approval
☒Recommend Denial

| /s/Bernard Ryzner | 2/23/00 |
|---|---|

Comments: BR 9/98 conspired to have another inmate bring drugs into (illegible) through visits (illegible). 1/12/97 fighting w/ weapons. Gardiner & 2nd inmate chased & stabbed 3rd inmate. 3rd inmate had lacerations to arm & neck. 9/88. Threatened inmate & told him he was going to have sex with him & (illegible).

Regional Director's Approval Required for Releases

☐Release Approved
☒Release Denied

| Regional Director Signature: /s/(illegible) | Date: 3/2/00 |
|---|---|

Comments:_____

DRC 2595 (Rev 12/99)

**Plaintiff's Exhibit Gardner-5**
**4:01cv071**

SUPERVISION REVIEW FORM
DEPARTMENT OF REHABILITATION AND CORRECTION
STATE OF OHIO

Number: # 149-278
Name: Gardiner, Keith
Date of Birth: 2/18/58

Date of Review: 1/7/01
Reviewer: D. Jones
Institution: OSP

| RACE: | | SEX: | | HISPANIC: | |
|---|---|---|---|---|---|
| White | ☐ | Male | ☐ | Yes | ☐ |
| Black | ☐ | Female | ☐ | No | ☐ |
| Other | ☐ | | | | |

Present Security Status:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Minimum Level 1 | ☐ | Medium | ☐ | High Close | ☐ | High Maximum RSP Murder | ☒ |
| Minimum Level 2 | ☐ | Close: | ☐ | Maximum | ☐ | | |

Date of Last Review: 1-11-00

| Section IA | UNFAVORABLE BEHAVIOR | WEIGHT | SCORE |
|---|---|---|---|
| 1. | FINDING BY RULES INFRACTION BOARD (since last review) | | |
| | Not Heard by RIB/Found Not Guilty | 0 | 0 |
| | Found Guilty by RIB | 2 | |
| 2. | ADMINISTRATIVE/LOCAL CONTROL PLACEMENTS (since last review) | | |
| | None | 0 | 0 |
| | One or More | 3 | |
| 3. | MOST RECENT VIOLENCE INDICATOR (last 5 years) (Includes pre-prison, current offense, institutional violence) | | |
| | No Violence in Last 60 Months | 0 | |
| | Violent Conviction/Infraction Within Past 25-60 Months | 1 | 1 |
| | Violent Conviction/Infraction Within Past 24 Months | 2 | |
| 4. | FREQUENCY OF GUILTY CLASS II DISCIPLINARY REPORTS (since last review) | | |
| | None | 0 | 0 |
| | 1 – 2 | 1 | |

| | | |
|---|---|---|
| 3 – 5 | 2 | |
| 6 or More | 3 | |
| SECTION I A SUBTOTAL SCORE (Items 1 - 4) | | 1 |

| Section I B | STABILITY FACTORS | WEIGHT | SCORE |
|---|---|---|---|
| 5. | EDUCATIONAL ATTAINMENT (pre-prison and during incarceration) | | |
| | High School Diploma/GED/Higher Education | -1 | 0 |
| | Less Than High School Equivalency | 0 | |
| 6. | INSTITUTIONAL JOB PERFORMANCE (since last review) | | |
| | No Job Removal/Removed for Other Reasons | -1 | -1 |
| | Removed for Discipline (Including Non-Job Related Behavior) or Indication of Poor Job Performance | 0 | |
| 7. | AGE AT THIS REVIEW | | |
| | Age 40 or Older | -1 | -1 |
| | Age 39 or Younger | 0 | |

| | |
|---|---|
| SECTION I B SUBTOTAL SCORE (Items 5-7) | -2 |

| | |
|---|---|
| TOTAL SCORE (Items 1-7) COMBINED SUBTOTALS: | -1 |

| (-3- -1 points) | (0 – 4 points) | (5 – 10 points) |
|---|---|---|
| Consider Supervision Decrease | Consider Present Supervision | Consider Supervision Increase |

DRC 2098 (REV 11/98)

SECTION II (Overrides and Recommendations)

Number:# 149-278
Name: Gardiner Keith
(last) (first)

1. Committee Options:

| Score Indicates Considering Supervision Decrease (-3 - -1) | Score Indicates Considering Present Supervision (0 – 4) | Score Indicates Considering Supervision Increase (5 – 10) |
|---|---|---|
| a. Agree: Decrease One Level ☒ | a. Agree: Continuation ☐ | a. Agree: Increase One Level ☐ |
| b. Disagree: Continue Present Level: ☐ | b. Disagree: Decrease One Level ☐ Increase One Level ☐ | b. Disagree: Continue Present Level ☐ |

2. Check (√) all the Special Management Concerns which Apply to this Inmate for Purposes of Overriding Scored Level:

Minimum Level 1
Non-Discretionary Overrides

- ☐ Sex Offender
- ☐ Kidnapping or abduction offense
- ☐ High notoriety case inmate

Discretionary Overrides

- ☐ Time left to serve
- ☐ Severity of current offense
- ☐ Extensive criminal history
- ☐ Good conduct
- ☐ Other _____
- ☐ Other _____
- ☐ Other _____

Higher Custody
Discretionary Overrides

- ☐ Meets criteria for placement in high close
- ☐ Conduct or presence poses a serious threat to physical safety of any person, or security of prison.
- ☐ Nature of offense indicates inmate poses a serious threat to the physical safety of any person, or security of prison.
- ☐ Participated in, threatened to participate in or is encouraging a disturbance or riot.
- ☐ Conspired to introduce contraband which may pose serious threat to security.
- ☐ Functions as a leader or enforcer of a security threat group.
- ☐ Poses a serious threat of escape.

Minimum Level 2
Non-Discretionary Overrides

- ☐ Any felony for causing death of a law enforcement officer or another person while incarcerated.
- ☐ Convicted of any capital offense, including former death row inmates.
- ☐ Documented history of escape.
- ☐ Medium security inmate serving indefinite sentence for an F1 or F2 and has not had statutory first parole board hearing.

☐ Ability to compromise integrity of staff

3. Override of Review Score is Recommended: ☐ Yes ☒ No

If yes, give rationale (required): _____

_____

4. Recommended Placement (check appropriate box)

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Minimum Level 1: | ☐ | Medium: | ☐ | High Close: | ☐ | High Maximum: | ☐ |
| Minimum Level 2: | ☐ | Close: | ☐ | Maximum: | ☒ | | |

| Chairperson (Signature): | Date: |
|---|---|
| /s/Roberta M. Banks | 01/09/01 |

5. Warden's Action: Approve: ☐ - Disapprove: ☒

6. Warden's Comments: Extensive history of assaults & predatory acts

| Warden (Signature): | Date: |
| --- | --- |
| /s/(illegible) | 1-24-01 |

DRC 2094 (REV 11/96)

SECTION II (Overrides and Recommendations) Continued

Number: # 149-278
Name: Gardiner Keith

8. Assignment Requires Transfer: Yes ☐ No ☐
Offense: _____

9. Mental Health Needs _____ Level: Yes ☐ No ☐
E.D.S./P.B.D./E.S.T.(Release Date)

10. Medical Needs _____ Level: Yes ☐ No ☐

---

11. Date of Next Review (month & year)
2/02

SECTION III (Bureau of Classification)

---

13. Bureau of Classification Action: Approve: ☒ Disapprove: ☐

14. Final Placement (check appropriate box):

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Minimum Level 1: | ☐ | Medium | ☐ | High Close: | ☐ | High Maximum | ☒ |
| Minimum Level 2: | ☐ | Close: | ☐ | Maximum: | ☐ | | |

15.

| Institutional Placement: |
|---|
| OSP |

16. Bureau of Classification Rationale (required): Seriousness of placement offense. Considered Highly dangerous. Stabbed another inmate.

17.

| Date Assigned by Bureau of Classification: | Initials: |
|---|---|
| 2/20/01 | BR |

DRC 2338 (REV 6/99)

**Plaintiff's Exhibit Lane-1**
**4:01cv071**

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED
94 JUL 28 AM 8:47
PAUL E. HARRISON
CLERK OF COURTS

VERDICT---Not Guilty

---

Court of Common Pleas, Warren County, Ohio

May Term, A.D. 1994

THE STATE OF OHIO

No. 94CR15948

vs.

Indictment for Murder

Stacy Lane

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant Stacy Lane not Guilty

Dated July 27, 1994

1. Phyliss Shubs
2. Sandra Smith
3. Thomas (illegible)
4. Alan V. Bone
5. Mary Ellen Buck
6. Roberta R. Thompson
7. Mary L Rapesino
8. Randall Poynte
9. Terry C. Dudley
10. Jean E. Trimer
11. Rick Ogg
12. Gary D. Moore

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED 230-299
94 AUG-2 AM 11:18
(ILLEGIBLE)
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT

STATE OF OHIO, ) CASE NO. 93CR15948
Plaintiff, )
)
vs. )
) ENTRY
STACY LANE, )
Defendant. )

This cause came on for Trial by Jury on the 25th, 26th, & 27th days of July, 1994. The Jury, having heard the evidence and arguments of counsel finds the Defendant, STACY LANE, NOT GUILTY.

It is therefore, CONSIDERED, ORDERED, and DECREED that Judgment be, and the same is hereby entered in favor of the Defendant.

Defendant is remanded to the custody of the Lebanon Correctional Institution to serve the remainder of his sentence on a prior conviction.

/s/Neal B. Brown
JUDGE, COMMON PLEAS COURT



**Plaintiff's Exhibit Robb-12**
**4:01cv071**

SEAL Ohio State Penitentiary Reclassification Panel
Security Reclassification

TO: Robb 308-919

DATE: 6/19/00

On 1/4/00 you appeared before the Security Classification Committee. At that time, you were recommended for a REDUCTION/RETAIN in security status. The Bureau of Classification in Columbus, Ohio has APPROVED/DENIED this request for the following reasons:

Poses greatest level of threat

Your next security Review is scheduled to take place on (approximately), 2/2001.

/s/Jremmick
Unit Management Administrator
Ohio Penitentiary

cc: Unit File
Inmate

**Plaintiff's Exhibit Robb-14**
**4:01cv071**

SEAL Ohio Department of Rehabilitation and Correction
1050 Freeway Drive North
Columbus, Ohio 43229

Bob Taft, Governor www.drc.state.oh.us Reginald A. Wilkinson, Director

July 11, 2000

Jason Robb 308-919
Ohio State Penitentiary
878 Coitsville Hubbard Road
Youngstown OH 44505

Dear Mr. Robb:

Thank you for your recent letter of appeal to the decision that you be continued at high-maximum security at the Ohio State Penitentiary.

According to my records, you were seen by the Review Committee on 1-4-00. It was the recommendation of the committee that you be released from high-maximum security. The Bureau of Classification and this office denied that recommendation and retained you at high-maximum security.

The information you provided and your records have been reviewed in accordance with AR 5120-9-53 and DRC Policy 111-07. It is the decision of this writer that your retention at high-maximum security is affirmed. There is no further appeal available to you in this matter. You will be seen again by the review committee in the month of January 2001.



If you have any additional questions, please do not hesitate to contact this office.

Sincerely,

/s/Stephen J. Huffman
Stephen J. Huffman
North Regional Director

cc: Warden Dave Johnson
Bernard Ryznar
File

WARDEN
RECEIVED
JUL 17 '00
OFFICE

**Plaintiff's Exhibit Roe-1**
**4:01cv071**

CONTROL UNIT HEARING RECORD

Institution: S.O.C.F. Lock Assignment: K-4-70
Inmate Name: _____ Number: ____ Hearing Date ___
Official Making Referral: R.I.B. Date of Significant Rule Violation(s): 1-24-99

Prior ☒ L.C. ☐ A.C. Placements? Date(s): 5/98
Summary of the Inmates Statement: I do not wish to make a statement.

RECOMMENDATION:

- ☐ Return to General Population
- ☐ Place in Local Control – Inmate has demonstrated a chronic inability to adjust to the General Population.
- ☐ Place in Local Control – Inmate's presence in the general population is likely to seriously disrupt the orderly operation of the institution.
- ☒ Place in Administrative Control – Inmate is a serious threat to the security of the Institution.
- ☐ Refer to Bureau of Examination and Classification for other appropriate placement.

Reasons for the Recommendation: II-19 2903N3 assaulted inmate Roe 208-6-.. by hitting him in the head with a spatula. Inmate Roe did not fight back. Committee recommends A/C placement due to the seriousness of the assault with a weapon involved.

signature *illegible* signature *illegible* signature *illegible*
committee member committee member committee member
Decision of the Warden: ☐ approved ☒ disapproved



Comments: Recommend transfer to OSP for assaulting inmate.

signature *illegible* 2/3/9

UNTOO9479D
DRC2341 ACA4241

**Plaintiff's Exhibit Roe-2**
**4:01cv071**

SUPERVISION REVIEW FORM
DEPARTMENT OF REHABILITATION AND CORRECTION
STATE OF OHIO

Number: # 208-653
Name: Roe, Kevin
Date of Birth: 11/18/58

Date of Review: 1/22/99
Reviewer: J. Grant
Institution: SOCF

| RACE: | | SEX: | | HISPANIC: | |
|---|---|---|---|---|---|
| White | ☒ | Male | ☒ | Yes | ☐ |
| Black | ☐ | Female | ☐ | No | ☒ |
| Other | ☐ | | | | |

Present Security Status:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Minimum Level 1 | ☐ | Medium | ☐ | High Close | ☐ | High Maximum | ☒ |
| Minimum Level 2 | ☐ | Close: | ☐ | Maximum | ☒ | | |

Date of Last Review: 7/98

| Section IA | UNFAVORABLE BEHAVIOR | WEIGHT | SCORE |
|---|---|---|---|
| 1. | FINDING BY RULES INFRACTION BOARD (since last review) | | |
| | Not Heard by RIB/Found Not Guilty | 0 | 0 |
| | Found Guilty by RIB | 2 | |
| 2. | ADMINISTRATIVE/LOCAL CONTROL PLACEMENTS (since last review) | | |
| | None | 0 | 0 |
| | One or More | 3 | |
| 3. | MOST RECENT VIOLENCE INDICATOR (last 5 years) (Includes pre-prison, current offense, institutional violence) | | |
| | No Violence in Last 60 Months | 0 | |
| | Violent Conviction/Infraction Within Past 25-60 Months | 1 | 1 |
| | Violent Conviction/Infraction Within Past 24 Months | 2 | |
| 4. | FREQUENCY OF GUILTY CLASS II DISCIPLINARY REPORTS (since last review) | | |
| | None | 0 | 0 |

| | |
|---|---|
| 1 – 2 | 1 |
| 3 – 5 | 2 |
| 6 or More | 3 |

SECTION I A SUBTOTAL SCORE (Items 1 - 4) 1

| Section I B STABILITY FACTORS | WEIGHT | SCORE |
|---|---|---|
| 5. EDUCATIONAL ATTAINMENT (pre-prison and during incarceration) | | |
| High School Diploma/GED/Higher Education | -1 | 0 |
| Less Than High School Equivalency | 0 | |
| 6. INSTITUTIONAL JOB PERFORMANCE (since last review) | | |
| No Job Removal/Removed for Other Reasons | -1 | -1 |
| Removed for Discipline (Including Non-Job Related Behavior) or Indication of Poor Job Performance | 0 | |
| 7. AGE AT THIS REVIEW | | |
| Age 40 or Older | -1 | -1 |

| | |
|---|---|
| Age 39 or Younger | 0 |

SECTION I B SUBTOTAL SCORE (Items 5-7) -2

TOTAL SCORE (Items 1-7) COMBINED SUBTOTALS: -1

| (-3- -1 points) | (0 – 4 points) | (5 – 10 points) |
|---|---|---|
| Consider Supervision Decrease | Consider Present Supervision | Consider Supervision Increase |

DRC 2098 (REV 11/98)

SECTION II (Overrides and Recommendations)

Number:# 208-653
Name: Roe Kevin
(last) (first)

1. Committee Options:

| Score Indicates Considering Supervision Decrease (-3 - -1) | Score Indicates Considering Present Supervision (0 – 4) | Score Indicates Considering Supervision Increase (5 – 10) |
|---|---|---|
| a. Agree: Decrease One Level ☒ | a. Agree: Continuation ☐ | a. Agree: Increase One Level ☐ |
| b. Disagree: Continue Present Level: ☐ | b. Disagree: Decrease One Level ☐ Increase One Level ☒ | b. Disagree: Continue |

2. Check (√) all the Special Management Concerns which Apply to this Inmate for Purposes of Overriding Scored Level:

**Minimum Level 1 Non-Discretionary Overrides**

- ☐ Sex Offender
- ☐ Kidnapping or abduction offense
- ☐ High notoriety case inmate

**Minimum Level 2 Non-Discretionary Overrides**

- ☐ Any felony for causing death of a law enforcement officer or another person while incarcerated.
- ☐ Convicted of any capital offense, including former death row inmates.
- ☐ Documented history of escape.

**Discretionary Overrides**

- ☐ Time left to serve
- ☐ Severity of current offense
- ☐ Extensive criminal history
- ☐ Good conduct
- ☐ Other _____
- ☐ Other _____
- ☐ Other _____

**Higher Custody Discretionary Overrides**

- ☒ Meets criteria for placement in high ~~close~~
- ☐ Conduct or presence poses a serious threat to physical safety of any person, or security of prison.
- ☐ Nature of offense indicates inmate poses a serious threat to the physical safety of any person, or security of prison.
- ☒ Participated in, threatened to participate in or is encouraging a disturbance or riot.
- ☐ Conspired to introduce contraband which may pose serious threat to

☐ Medium security inmate serving indefinite sentence for an F1 or F2 and has not had statutory first parole board hearing.

security.
☒ Functions as a leader or enforcer of a security threat group.
☐ Poses a serious threat of escape.
☐ Ability to compromise integrity of staff

---

3. Override of Review Score is Recommended: ☒ Yes ☒ No

If yes, give rationale (required): Long standing member of the (REDACTED?) Participated in a racial disturbance over 5 years ago

---

4. Recommended Placement (check appropriate box)

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Minimum Level 1: | ☐ | Medium: | ☐ | High Close: | ☐ | High Maximum: | ☐ |
| Minimum Level 2: | ☐ | Close: | ☐ | Maximum: | ☒ | | |

| | |
|---|---|
| Chairperson (Signature): /s/ (illegible) | Date:1/21/99 |

5. Warden's Action: Approve: ☐ Disapprove: ☒

6. Warden's Comments: Extensive history of assaults & predatory acts

| Warden (Signature): | Date: |
|---|---|
| /s/ Stephen J. Huffman | 1-25-99 |

DRC 2094 (REV 11/96)

SECTION II (Overrides and Recommendations) Continued

Number: # 208-653
Name: Roe, Kevin

8. Assignment Requires Transfer: Yes ☐ No ☐

9. Mental Health Needs _____ Level: Yes ☐ No ☐

10. Medical Needs _____ Level: Yes ☐ No ☐

Offense: _____

11. Date of Next Review (month & year)
2/2000

SECTION III (Bureau of Classification)

13. Bureau of Classification Action: Approve: ☒ Disapprove: ☐

14. Final Placement (check appropriate box):

| | | | | | |
|---|---|---|---|---|---|
| Minimum Level 1: | ☐ | Medium | ☐ | High Close: | ☐ |
| High Maximum | | ☒ | | | |
| Minimum Level 2: | ☐ | Close: | ☐ | Maximum: | ☐ |

15.

| Institutional Placement: |
|---|
| OSP |

16. Bureau of Classification Rationale (required): Meets criteria for High Max placement.

17.

| Date Assigned by Bureau of Classification: | Initials: |
|---|---|
| 2/2/99 | B/R |

DRC 2338 (REV 11/98)

**Plaintiff's Exhibit Roe-6**
**4:01cv071**

Ohio Department of Rehabilitation and Correction
High Maximum Security Classification Review

| Name: ROE, KEVIN | | Number: A208-653 |
|---|---|---|
| Lock: C7-21 | High Max Level: 2 | Institution: OSP |
| Date of Current Placement: 2/10/99 | | Sending Institution: SOCF-MAX |

Justification for High Maximum Security Classification: (illegible) were running gambling tickets. Was (Leoto) involved in (illegible) fights, and disturbances

Adjustment while in High Maximum Security Classification: _____

Inmate comments at time of hearing: _____

High Maximum Security Classification Committee Action

☐ Retain in high Maximum Security Classification
☒ Recommend release from High Maximum Security Classification
☐ Other: _____

Justification for Action Taken

☐ Based upon this inmate's assaultive, predatory, or other dangerous conduct, he/she continues to require placement in a high max security classification.



☐ there is a likelihood that if released, the inmate would continue to demonstrate aggressive, disruptive and or predatory behavior.
☒ Based upon the inmate's adjustment while in high maximum security, inmate no longer represents department's highest level of theat to security and order, and is appropriate for security reduction.
Was sent to OSP from General Pop. 2 months after incidents
☒ Other: Was not involved in incident in library.

Comments: Only involvement—He was hit with a spadula in chow hall. It appears he was assigned to OSP based on History in 97—only 4 tickets during incarceration—No assaults or violence.

| Date of Next Review: | |
|---|---|
| Warden's Designee's (Deputy Warden) Signature: /s/(illegible) | Date: 4/6/00 |
| Warden's Designee's (Mental Health Professional) Signature: /s/(illegible) | Date: 4/6/00 |
| North Regional Director's Designee's Signature: /s/(illegible) | Date: 4/6/00 |

| Warden's Recommendation | Warden's Signature: | Date: |
|---|---|---|
| ☒Recommend Approval<br>☐Recommend Denial | (illegible) | 4-12-00 |

Comments: _____

Chief, Bureau of Classification Review

☐ Recommend Approval
☒ Recommend Denial

| Chief Signature: | Date: |
|---|---|
| /s/Bernard Ryzner | 5/1/00 |

Comments: Inmates STG activity directly led to assaults, fights and disturbance at SOCF

Regional Director's Approval Required for Releases

☐ Release Approved
☒ Release Denied

| Regional Director Signature: | Date: |
|---|---|
| /s/Terry Collins | 5/8/2000 |

Comments:

DRC2595 (Rev 12/99)



**Plaintiff's Exhibit Roe-10**
**4:01cv071**

Ohio Department of Rehabilitation and Correction
High Maximum Security Classification Review

| Name: ROE, KEVIN | | Number: A208-653 |
|---|---|---|
| Lock: C7-21 | High Max Level: Level 3 | Institution: OSP |
| Date of Current Placement: 02-10-99 | | Sending Institution: SOCF |

Justification for High Maximum Security Classification: ID as leader MAB who along with (redacted) was running gambling tickets. Was involved in gang assaults, fights and disturbances.

Adjustment while in High Maximum Security Classification: Good –Level 3

Inmate comments at time of hearing: (illegible) gang affiliation (but says he is finished with that stuff. Does not like OSP. Last ticket in 1997.

High Maximum Security Classification Committee Action

☐ Retain in high Maximum Security Classification
☒ Recommend release from High Maximum Security Classification
☐ Other: _____

Justification for Action Taken

- ☐ Based upon this inmate's assaultive, predatory, or other dangerous conduct, he/she continues to require placement in a high max security classification.
- ☐ There is a likelihood that if released, the inmate would continue to demonstrate aggressive, disruptive and or predatory behavior.
- ☒ Based upon the inmate's adjustment while in high maximum security, inmate no longer represents department's highest level of threat to security and order, and is appropriate for security reduction.
- ☐ Other: _____

Comments: Overall good adjustment. Involved in programming. Has remained ticket free. Level 3.

| | |
|---|---|
| Date of Next Review:<br>2/02 | |
| Warden's Designee's (Deputy Warden) Signature:<br>/s/David Bobby (illegible) | Date:<br>2-6-01 |
| Warden's Designee's (Mental Health Professional) Signature:<br>/s/(illegible) | Date:<br>2/6/01 |
| North Regional Director's Designee's Signature:<br>/s/Roberta W. Banks | Date:<br>2/6/01 |

| Warden's Recommendation | Warden's Signature: | Date: |
|---|---|---|
| ☒Recommend Approval<br>☐Recommend Denial | (illegible) | 2-23-01 |

Comments: (illegible)



| Chief, Bureau of Classification Review | Chief Signature: | Date: |
|---|---|---|
| ☐Recommend Approval<br>☒Recommend Denial | /s/Bernard Ryznar | 3/6/01 |

Comments: Recommend continue high max. Involved in conduct that resulted in disturbances at SOCF

Regional Director's Approval Required for Releases

| | | |
|---|---|---|
| ☐Release Approved<br>☒Release Denied | Regional Director Signature:<br>/s/Stephen J. Huffman | Date:<br>3/6/01 |

Comments:

DRC2595 (Rev 12/99)

**Plaintiff's Exhibit Thompson-4**
**4:01cv071**

Ohio Department of Rehabilitation and Correction
High Maximum Security Classification Review

| Name: Thompson, Lahray | | Number: A337-139 |
|---|---|---|
| Lock D4-28 | High Max Level: 2 | Institution: OSP |
| Date of Current Placement: 1/21/99 | | Sending Institution: SOCF - Max |

Justification for High Maximum Security Classification:
"CRIP" capt. identified as being involved in gang assaults, fights and disturbances @SOCF

Adjustment while in High Maximum Security Classification:
Good at OSP

Inmate comments at time of hearing: Claims he is not a gang member and was not involved in a fight; has never been written up for gang activity. Denies his nickname is "Little Capone."

High Maximum Security Classification Committee Action
☐ Retain in High Maximum Security Classification ☒ Recommend release from High Maximum Security Classification

☐ Other action: _____

Justification for Action Taken
☐ Based upon this inmate's assaultive, predatory, or other dangerous conduct, he/she continues to require placement in a high max security classification.



☐ There is a likelihood that if released, the inmate would continue to demonstrate aggressive, disruptive and or predatory behavior.
☐ Based upon the inmate's adjustment while in high maximum security, inmate no longer represents department's highest level of threat to security and order, and is appropriate for security reduction.
☒ Other: Ticket does not specify who he was fighting—(very general) Inmate does not have any gang related tickets or any fighting or assault Tickets

Comments: In his record- it appears he has been mixed up w/ Inmate Capone 293-8 who is Id'ed as Crip Leader.

| Date of Next Review: | |
|---|---|
| Warden's Designee's (Deputy Warden) Signature: // signature *illegible* // | Date: 2-21-00 |
| Warden's Designee's (Mental Health Professional) Signature://signature *illegible* // | Date: 2/29/00 |
| Warden's Designee's (Director's Designee's) Signature:// signature *illegible* // | Date: 2/29/00 |

Warden's Recommendation
☒ Recommend Approval ☐ Recommend Denial

Warden's Signature: //signature *illegible* Date: 4/3/00

Comments: _____

Chief, Bureau of Classification Review
☐ Recommend Approval ☒ Recommend Denial

| Chief Signature: //signature *illegible* | Date: *// illegible* |
|---|---|

Comments: Crip leader involved in assaults on AB members at SOCF during gang fights assaults and disturbances at SOCF resulting in institution lockdown.

Regional Director's Approval Required for Releases
☐ Release Approved ☒ Release Denied

| Regional Director Signature: //signature *illegible* Date: 4/5/00 |
|---|

Comments: _____

DRC 2595 (Rev 12/99)



**Plaintiff's Exhibit Thompson-6**
**4:01cv071**

Ohio Department of Rehabilitation and Correction
High Maximum Security Classification Review

| Name: Thompson, Lahray | | Number: 337-139 |
|---|---|---|
| Lock D1-27 | High Max Level: level 3 | Institution: OSP |
| Date of Current Placement: 1-21099 | | Sending Institution: SOCF - Max |

Justification for High Maximum Security Classification:
Identified as Crip Capt. as being involved in gang assaults, fights, disturbances at S.O.C.F. No II 31 tickets. However 8-12-97 #7-tested positive for marijuana. No fight tickets.

Adjustment while in High Maximum Security Classification:
Excellent-level 3.

Inmate comments at time of hearing: Inmate states he is not a gang member.

High Maximum Security Classification Committee Action
☐ Retain in High Maximum Security Classification
☒ Recommend release from High Maximum Security Classification
☐ Other action: _____

Justification for Action Taken
☐ Based upon this inmate's assaultive, predatory, or other dangerous conduct, he/she continues to require placement in a high max security classification.

☐ There is a likelihood that if released, the inmate would continue to demonstrate aggressive, disruptive and or predatory behavior.

☐ Based upon the inmate's adjustment while in high maximum security, inmate no longer represents department's highest level of threat to security and order, and is appropriate for security reduction.

☐ Other: _____

Comments: Adjustment has been good. Ticket free. Unable to *illegible* "gang-related" information.

| Date of Next Review: 2/02 | |
|---|---|
| Warden's Designee's (Deputy Warden) Signature: // signature *illegible* // | Date: 2-5-01 |
| Warden's Designee's (Mental Health Professional) Signature: // signature *illegible* // | Date: 2/5/01 |
| Warden's Designee's (Director's Designee's) Signature: // signature *illegible* // | Date: 2/5/01 |

Warden's Recommendation

☐ Recommend Approval ☒ Recommend Denial

Warden's Signature: //signature illegible Date: 2-23-01

Comments: Identified STG leader - //remaining comments *illegible*//



Chief, Bureau of Classification Review

☒ Recommend Approval ☐ Recommend Denial

Chief Signature: //signature *illegible* Date: 3/14/01

Comments: Recommend reduction; level 3 and good adjustment

Regional Director's Approval Required for Releases

☐ Release Approved ☒ Release Denied

Regional Director Signature: //signature *illegible*// Date: 3/19/01

Comments: _____

DRC 4018 (03/98)

**Plaintiff's Exhibit Thompson-7**
**4:01cv071**

CONDUCT REPORT

| Institution: Ohio State Penitentiary | | |
|---|---|---|
| Name: 337-139 | Lock: D-Block | Work Assignment: Idle |
| Rule(s) violation: 1 | Class: II | Rule(s): 31 Engaging in unauthorized activates as set forth in 5120-9-3 |
| Class | Rule(s): | |

Supporting Facts (Use reverse side if necessary): On the above date while processing incoming mail, the undersigned observed a letter authored by inmate Thompson 337-139 going to (redacted) . The envelope was opened and searched for contraband. The undersigned after careful observ.... noticed that inmate Thompson 337-139 crossed or drew a line through several letter Bs. This action is commonly done by gang members to show disrespect to other rival gangs. In this case Thompson is an identified Crip member and is disrespecting the Bloods. His actions are in direct violation of 5120-9-37 Section B Subsection 2-C. Notice of withholding correspondence sent to both parties.

Note: original letter is secured in the STG office

Inmate Attitude (at time of offense): N/A

| Days Off: 5/5 | Shift: 1st | Signature of Reporting Officer: M. Wylie |
|---|---|---|

Administrative Review Officer



☒ Concurs ☐ Altered ☐ Withdrawn

Comments: _____

| Signature, Administrative Review Officer: *signature illegible* | Date: 3/23/01 |
|---|---|

copy of this ticket was served upon the above-named inmate on 3/23/01, 2001, at 1300 ~~am~~/pm.

UNTO11208

| Inmate Signature: *x* Thompson 337 139 | Number: |
|---|---|

DRC 4018 (03/98)

**Plaintiff's Exhibit Tolliver-9**
**4:01cv071**

9/20/01 0L0POO9A
14:10:17 PAGE#: 5

CASE HISTORY LISTING

Case #/Name: 00CR18762 TOLLIVER, KEVIN
Caption: STATE OF OHIO – VS – TOLLIVER, KEVIN

KEVIN D TOLLIVER
60401 DEMAND FOR DISCOVERY FILE (39)
60801 MOTION & ENTRY TO APPROVE COUNSEL FEES FILED (40)
61301 ORDER TO CONVEY (COPY SENT TO LCI BY PROS OFFICE (41)
61301 PRECIPES FILED & SUBPOENAS ISSUED TO SHER WARREN, HAMILTON & MONT
62001 4 PRECIPE RETD & FILED RESIDENCE SERVICE-SHER WARREN CO.
62001 2 PRECIPE RETD & FILED RESIDENCE SERVICE-SHER WARREN CO
62601 PRECIPE RETD & FILED RESIDENCE SERVICE-SHER HAMILTON CO.
62701 NOTICE OF HEARING ISSUED
KEVIN W. ATTKISSON
KEVIN TOLLIVER
KENNETH A EWING
PROBATION DEPT
KEVIN D TOLLIVER
062701 9:45 AM PRETRIAL HEARING
62901 ENTRY FILED (42)
62901 PRECIPE RETD & FILED-NOT SERVED-SHER WARREN CO.



70201 PRECIPE RETD & FILED PERSONAL SERVICE-SHER WARREN CO.
70201 4 PRECIPE RETD & FILED PERSONAL SERVICE-SHER WARREN CO.
70301 2 PRECIPE RETD & FILED RESIDENCE SERVICE-SHER WARREN CO.
70301 3 PRECIPE RETD & FILED RESIDENCE SERVICE-SHER WARREN CO
70301 PRECIPE RETD & FILED RESIDENCE SERVICE-SHER WARREN CO
71701 PRECIPE RETD & FILED RESIDENCE SERVICE-SHER HAMILTON CO
73101 (9) ORDERS FILED-COPIES TO SHERIFF (42)
80201 ORDER FILED (43)
30301 LABELS ONLY
KEVIN W ATTKISSON
81401 PRECIPE RETD & FILED-NOT SERVED-SHER WARREN CO
082401 08:45 AM
CONFERENCE *
082701 09:00 AM THREE DAY JURY TRIAL
82801 VERDICT NOT GUILTY-ASSAULT CT 1 (354-412) (44)
82801 VERDICT NOT GUILTY –ASSAULT CT 2 (354-408) (45)
82801 VERDICT NOT GUILTY –ASSAULT CT 3 (354-410) (46)
082801 09:00 AM THREE DAY JURY TRIAL
82901 ENTRY FILED-DEF FOUND NOT GUILTY (354-497) (47)
082901 09:00 AM THREE DAY JURY TRIAL
90501 MOTION & ENTRY TO APPROVE COUNSEL FEES FILED (48)
90601 MOTION FILED (COPY RET'D TO DEF) (49)
90601 LABELS ONLY
KEVIN TOLLIVER

91001 MEMORANDUM IN OPPOSITION TO
DEFENDANTS MOTION (50)
91301 NOTICE OF HEARING ISSUED
KENNETH A EWING
PROBATION DEPT
KEVIN D TOLLIVER



**Plaintiff's Exhibit Tolliver-4**
**4:01cv071**

OHIO DEPARTMENT OF REHABILITATION
AND CORRECTION
SEAL
1050
Freeway Drive North
Columbus, Ohio 43229

Bob Taft, Governor Reginald A. Wilkinson, Director
www.drc.state.oh.us

May 05, 2000

TOLLIVER, KEVIN A370-500
LEBANON CORRECTIONAL INSTITUTION

Dear Inmate TOLLIVER, KEVIN:

I received your appeal on 4/12/00 requesting a review of the decision of the Rules Infraction Board on 3/30/00.

A careful review of the procedural records was conducted by my legal staff. Please be advised that:

(1) You were validly charged with the proper rule infraction.
(2) There was no prejudicial violation of procedural rights under the rules of the Administrative Code.
(3) There was some factual evidence in the record to support the decision.
(4) The penalty assessed was authorized or appropriate.

Therefore, your appeal must be denied.

Sincerely,

*/s/* Reginald A. Wilkinson
REGINALD A. WILKINSON
Director
cc: Warden
RIB File



## AFFIDAVIT OF MATTHEW MEYER

State of Ohio :
: ss.
County of Franklin :

Now comes Matthew Meyer, having been first duly sworn, and states and affirms as follows:

* * *

10. It is also important to note that good behavior while at OSP is not necessarily a reliable predictor of good conduct once an inmate is reduced to security level 4. There have been a number of instances where inmates with clean records at OSP engaged in very disruptive behavior soon after they were reduced to security level 5. For example inmate Randy Coleman, R148-976, was transferred to OSP because he was a leader of the Aryan Brotherhood STG. He was transferred from OSP to SOCF in December of 2001 because of, among other things, the fact that he behave himself while at OSP. However, in April of 2002, less than six months later, he was involved in a very serious assault on inmate Kevin Roe, 208-653 that Roe and others have stated was tied into Roe's involvement with the Aryan Brotherhood. That assault resulted in serious injury to Roe Coleman's role in that assault was verified by Roe himself.

11. Another example of the reality that good behavior at OSP does not predict good behavior in a less restrictive institutions is found in inmate John Perotti 167-712. He was transferred to OSP because of an incident related to substance abuse. He was reduced to security level 5 because of *inter alia*, his good behavior while at OSP. However, after returning to SOCF he was proven to have

been involved in a significant drug smuggling efforts following his release from OSP. See exhibit A hereto.

12. The Disputed Orders will also interfere with ODRC's ability to prevent third party violence directly related to level 5 inmates but not attributable to specific acts of misconduct by those inmates. For example, certain prominent STG leaders will, by virtue of their status as such, attract violent actions from other inmates who are either members of rival STG's or rivals within the leader's STG. That will have adverse effects on persons other than the STG leader. Assault on one STG member will often trigger reprisals against members of the STG the assailant is associated with, including members who were not involved in the initial assault. Further, staff will be required to intervene in any such assaults, putting them at risk of physical injury or death. The only way to avoid that violence is to keep the STG leader confined to level 5, but the Disputed Orders prohibit that result absent additional misconduct on his behalf while in level 5.

13. The problem described in paragraph 12 above is not hypothetical but was recently illustrated by event concerning one member of the Plaintiff class in *Austin*. Inmate Kevin Roe, 208-653, was placed at OSP because of his involvement in the Aryan Brotherhood STG. He was reduced to security level 5 and transferred to SOCF. Shortly after he arrived at SOCF he was the target of a very serious, coordinated assault by a number of inmates affiliated with the Arya Brotherhood. That assault was related to Roe's previous involvement with the Aryan Brotherhood, as Roe himself has acknowledged.

* * *



Further affiant sayeth naught.

/s/ MATTHEW MEYER

Sworn to before me and subscribed in my presence this 3 day of June, 2002.

/s/ Brigitte Puckett
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES E. AUSTIN, et al.,

Plaintiffs,

vs. Civil Action No.
4:01CV071

REGINALD WILKINSON, et al.,

Defendants.

DEPOSITION of REGINALD WILKINSON

Taken at the offices of
Department of Rehabilitation
and Correction
1050 Freeway Drive, North
Columbus, Ohio 43229

on October 22, 2001, at 10:05 a.m.

Reported by: Sara S. Cox, RPR/CRR



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on behalf of the Defendants

ALSO PRESENT:
Stephen J. Huffman
Bernard Ryznar

## STIPULATIONS

It is stipulated by and among counsel for the respective parties that the deposition of REGINALD WILKINSON, the Defendant herein, called by the Plaintiffs under the applicable Rules of Civil Procedure, may be taken at this time by the notary by agreement of counsel; that said deposition may be reduced to writing in stenotypy by the notary, whose notes thereafter may be transcribed out of the presence of the witness; and that the proof of the official character and qualification of the notary is waived.



## INDEX OF EXAMINATION

PAGE

BY MR. LYND: ..... 6

## INDEX OF EXHIBITS

PAGE

Exhibit 6 ..... 14
4-9-98 article from The Vindicator

Exhibit 10 ..... 15
Administrative Rule 5120-9-12

Exhibit 8 ..... 21
4-9-98 news release

Exhibit 4 ..... 22
4-10-98 article from The Columbus Dispatch

Exhibit 9 ..... 23
4-10-98 article from The Cleveland Plain Dealer

Exhibit 12 ..... 31
ODRC internal management audit dated August 18-20, 1998

Exhibit 13 ..... 36
1998 ACA accreditation report

Exhibit 14 ..... 44
ODRC internal management audit report, 2001

Exhibit 15 ..... 47
December, 1998 final report of the OSP quality review team

Exhibit 18 ..... 71, 83

ODRC draft policy re: Level 4/Level 5 classification for male inmates



[Page 97]

particular persons is that they make it concrete for all of us.

Plaintiffs' Exhibit 32 appears to be a letter from the hearing officer of the Ohio Parole Board, directed to Jerome Lennon, also known as Quinta Quenata. And in the third paragraph of this letter, it says, "The parole board has not paroled any inmates from maximum security status since shortly after the 1993 riot per the director of DR&C."

Do you see that sentence?

A. Yes.

Q. Is there, Mr. Wilkinson, some policy that you initiated at some point in time to the effect that a person cannot be paroled from maximum security status?

A. It was my direction to the Ohio Parole Board to pursue not paroling persons from a maximum security status, which they ultimately incorporated in their guidelines for release.

Q. Is it fair to say that this is an existing policy and practice of the

[Page 98]

department?

A. Yes.

Q. And if it's inappropriate to parole a person from maximum security status, it would be as much or even more

inappropriate, would it not, to parole a person from high maximum security status?

MR. MANCINI: Objection.

Would you repeat the question? I am not following this. Would you repeat the question?

(Record read back as requested.)

MR. LYND: I can simplify the question, especially because it was meant to be inappropriate.

MR. MANCINI: Go ahead.

MR. LYND: Let me just ask.

BY MR. LYND:

Q. Is it also the policy and practice of the department not to parole a person on high maximum security status?

A. I've never directed the parole board to not parole someone from a high maximum security status. I presume they're deciding

[Page 99]

that maximum security and high maximum security status should at least be considered the same.

Q. Would you agree, Mr. Wilkinson, that the practical effect of that policy is that a prisoner at the Ohio State Penitentiary must work his way down to close security before he has an opportunity to be paroled?



A. If the parole board includes high maximum as a part of the process of not paroling maximum security inmates, then that's correct. They need to earn their way to a more—to a lower status.

Q. And are you aware that there are persons who have been told by the parole authority, we're ready to parole you right now, but we can't do it because of your security status?

A. No.

Q. Supposing that were the case, what would your attitude be?

A. I'm not capable of responding to a hypothetical situation.

Q. Okay. Well, let me give you one

[Page 100]

which is not hypothetical.

Plaintiffs' Exhibit 33 consists of four pages concerning Mr. DeJarnette. And I'm going to ask my co-counsel's help in interpreting.

MR. MANCINI: Take a look at that.

A. You can ask your question.

Q. Mr. Wilkinson, are you familiar with the concept of a guideline?

MR. MANCINI: You mean parole guidelines; is that what you're saying?

MR. LYND: Yes.

Q. Are you familiar with that concept?

A. I am familiar with that concept.

Q. Can you explain it as you understand it?

A. I cannot give you the specific details of the parole guidelines—

Q. Just your impression.

A. a—other than the fact that the Ohio Parole Board has, at their disposal, some general guidelines that allow them to make informed decisions for release of persons eligible to be for statutory parole board

[Page 101]

hearing.

Q. And would it be an approximately correct paraphrase to say that the guideline gives the parole board orientation as to how long they might expect a person to be actually incarcerated for a specific kind of offense?

A. There are some general guidelines that suggest length of time, but the parole board can certainly deviate from those guidelines.

Q. I understand.

Now, let me direct you to the middle of the first page of Plaintiffs' Exhibit 33, which appears to represent that the guideline in this specific case is 48 to 60 months, and the



time served to the date of this document, last year, is 92 months, correct?

A. That's correct.

Q. Now, let's turn the page to Page 2. And there is a handwritten paragraph here, difficult to read, entered, it would appear, by parole authority personnel. And let me

[Page 102]

read aloud what I see in these words.

"Inmate serving first adult commitment. He is currently high max security with next security screening 12, 2000. He has served above the recommended range; however, his security status prevents a release recommendation. Time assigned—

MRS. LYND: Assessed.

Q. —assessed to get inmate to earliest opportunity for reduction to close."

And then there's a note that they've added, "19 additional months to serve until his next eligibility day."

MR. MANCINI: What is your question?

MR. LYND: I'm about to ask it.

BY MR. LYND:

Q. Would it appear to you—I understand you're not familiar with Mr. DeJarnette—that here we have a prisoner whose guideline range is 48 to 60 months, who has actually served 92 months and has just been assessed an additional 19 months by the parole authority so that that

[Page 103]

prisoner can lower his security classification?

MR. MANCINI: What—

A. The question is?

MR. MANCINI: What's your question?

Q. Would you agree with me that that is the stated facts which this document appears to present?

A. Sure. Those are the facts as they are described by the person representing the parole board.

Q. I understand. That's all I mean. That's all I mean, Mr. Wilkinson.

A. Sure. But—

Q. Now, my reason for asking, to say it one more time, is this: Is there, from your point of view, a problem if a person whom the parole authority might be ready to release is kept in confinement for months, and, indeed, years, beyond that projected release date because of his security status?

A. I don't read that the same way you're reading it. You're reading it as if this inmate was not in a maximum security

[Page 104]

status, that the parole board would automatically release him. The parole board guidelines say that it's above the



recommended range. The parole board, probably on a regular basis, keep people above the recommended range who are not in a maximum security status. So it does not reasonably follow that because they are above a time in their recommended range and they're at a maximum security level that they're going to be released, even by the parole board's guidelines.

Q. From the point of view of the department, which you head, Mr. Wilkinson, is classification in maximum or high maximum security status an absolute bar to release by the parole board?

A. The parole board has used the maximum security status as one that will not be eligible for parole. I don't know what they're doing with respect to the high maximum security status. At the present time, the parole board does not release anyone on a parole release who are in—

[Page 105]

who's in a maximum security status.

Q. And you understand, I hope, that the reason I'm pursuing this with you is that the parole board represented to Mr. Lennon—and I think you agreed that it adopted this policy to begin with because of a directive from you.

A. Well, it was a recommendation from me in consultation with a multitude of other staff.

Q. And since you have at least some part in the creation of this policy, what I'm trying to ask you, not about any particular case, but as a general matter, does it concern you that someone whom the parole board might—might be

ready to release, in fact, keeps that person confined for a matter of years because of this policy that you initiated?

A. And I'm saying to you that the parole board keep certain people who are not in maximum security status and who has time well above the range on the parole board guidelines, so it doesn't logically follow

[Page 106]

to me that the parole board would release anybody from custody of this department because their range has maxed out and because they're in maximum security.

Q. You would agree, of course, that when a person maxes out, they can go from high maximum security to the street, correct?

A. That's correct.

Q. Suppose the parole board were to say in the case of a particular prisoner, we think you're ready for release, and even though you're in high maximum security, we're going to release you. What would your attitude be?

A. Well, I—

MR. MANCINI: Go ahead.

A. —I've not heard the parole board say that. They certainly will not say that to me. And the parole board has to take in consideration the other factors that contribute to an orderly operation of this prison system, as well as making sure that we maintain all possible ways of

[Page 107]



effectuating public safety.

Q. Do you consider that you have the authority to override, to veto, a specific decision of the parole board?

A. I do not override a decision of the parole board.

Q. So hypothetically, at least, if the parole board were to decide to release someone in high maximum security status, there would be nothing you could do about it?

A. I said I don't do it; I didn't say I couldn't.

Q. Well, what could you do?

A. Well, I could ask the parole board to reconsider their decision.

MR. LYND: It's about 8 minutes of 1:00. I'd like, if I might, to take those 8 minutes as a very short break, with the expectation that when we reconvene, we'll almost immediately conclude.

MR. MANCINI: Okay.

MR. LYND: Is that okay?

MR. MANCINI: That's fine.

[Page 108]

MR. LYND: Thanks.

(Break taken.)

MR. LYND: We have no further questions.

MR. MANCINI: That's it?

MR. LYND: Yes.

MR. MANCINI: Thank you very much.

(Court reporter instructs witness as to signature.)

THE WITNESS: I want to be able to correct any typographical—

MR. MANCINI: We'll read.

Thereupon, the testimony of October 22, 2001, was concluded at 1:03 p.m.



**TRANSCRIPT OF PROCEEDINGS HAD BEFORE**

**THE HONORABLE JAMES S. GWIN,**

**JUDGE OF SAID COURT,**

**ON MONDAY, JANUARY 7TH, 2002.**

**- - - - -**

**VOLUME 1**

**- - - - -**

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**Akron, Ohio 44308-1811**
**330/374-9335**
**Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.**

## TESTIMONY OF JAMIE FELLNER

[66] prison or in the free society, are entitled to respect for their basic human dignity.

And extrapolated from that is another corollary which is in law, in treaties which the United States has signed and which we believe are binding on State officials as well as federal officials, is that no inmate should be subjected to cruel, inhuman or degrading treatment, much less torture.

One of the corollaries of this is that you shouldn't be subjected to treatment that is unnecessarily or pointlessly harsh. And that's a very difficult concept, and I fully recognize the challenge for correctional officials of balancing the need to respect the dignity of all inmates and meet their obligations to provide a safe and secure environment.

And as a human rights activist, advocate and researcher, I would be the first to say it is also the obligation of correction officials to provide safe environments because inmates have a right to a safe, secure, humane environment.

So I'm very well-aware of the difficult challenge they face.



Nevertheless, in the case of supermaxes, many supermaxes', including Ohio, attention to the needs of the individual and the basic dignity of the individual have [67] been overlooked in the quest for absolute security.

Q. You mentioned—

MR. LANDES: Excuse me.

May I move to strike the statement that she believes that international law is binding on this Court?

THE COURT: You know, that's a legal conclusion and that's something I'm not going to give any weight to, so it can be argued in a brief if the plaintiffs take a position it is applicable somehow, but it's not controlling upon the Court.

MR. LOBEL: Your Honor, this is—

THE COURT: Just go ahead and ask a question.

MR. LOBEL: Okay.

BY MR. LOBEL:

Q. You mentioned that subsequent to your visit, you understand there have been a number of changes at OSP.

If I were to tell you that one of the changes were that subsequent to your visit, metal strips were placed along the bottom, top and side of the door so that there is no opening any more, there's no opening on the bottom or the side or the top of that door, could you tell me in your opinion what effect that would have on these conditions in light of your

testimony on cruel and degrading, unnecessarily degrading treatment?

A. You know, one of the worst things about super-maximum

* * *

[77] Is that a basic principle held generally by correctional officials in the United States, in your experience?

A. I actually think, yes, in my experience they wouldn't use "human rights principles" because that's not a language they tend to use, but if you look at how classification systems are set up and what corrections officials try to do, they try to place inmates, if only for cost reasons, and if nothing else, and maybe for rehabilitation reasons, in the least restrictive environment.

Q. Does that principle in your opinion affect how long prisoners ought to be held in supermax confinement?

A. Absolutely. If, if there are good reasons for putting an inmate into super-maximum security confinement, they should only be kept under those restrictions for as long as absolutely necessary.

When the reasons that precipitated that placement no longer exist, they should be removed.

Q. And in your experience, do most supermax prisons maintain some kind of criteria, objective criteria, to allow people to earn their way out of supermax prison—of that prison?



A. It is certainly, I think, the common practice among supermaxes that even if the term is officially indefinite, that inmates be told that if they comply with certain [78] behavioral expectations, that are usually quite formalized and meet various hurdles, behavioral hurdles, that they will at least be eligible to be released, and in some cases there is the presumption that they will be released.

Those systems vary from Connecticut where inmates, if they comply with the behavior program, would be out in 18 months; Colorado where the program was, I think, a little bit over three years if they again do everything they are supposed to; to some facilities where it's indefinite and inmates have no idea what they have to do to get out or if they ever will get out.

Q. Back to Exhibit Number 11, the last sentence in that paragraph which the CIIC quoted from your report, you say "Given the importance of the decision to place someone in the extreme conditions of supermax confinement, it is critical that adequate safeguards exist to ensure that it is made carefully and fairly."

In your opinion, what constitutes the critical adequate safeguards in this supermax context?

MR. LANDES: Objection.

THE COURT: I don't understand the question. You will need to rephrase it.

Q. In your report, what did you mean by "adequate safeguards" in the context of supermax confinement?

A. All classification decisions, including the decision

* * *

[88] homicide is committed, that they could be considered appropriate for placement.

But just because somebody commits a murder out on the streets doesn't mean that they need super-maximum security confinement. In fact, generally they are not placed in super-maximum security confinement.

Q. Okay. Let's say a murderer in prison, would you concede that that's serious, is violent and disruptive?

A. It is certainly violent and disruptive. Again, whether or not it warrants supermax placement depends on the context in which the homicide occurs. I think you need to look at the inmate's entire profile.

If it was an inmate who was being prayed upon by others, who was being subjected to many rapes and who finally decided he had enough and he lashed out, that may or may not warrant supermax placement.

Q. What I asked was is murder violent?

A. Murder is violent.

Q. Okay.

A. Self-defense can be violent, too.

Q. Is stabbing and fighting, is that violent?

A. Yes.



Q. Is conveying drugs into the prison seriously disruptive?

A. Yes.

* * *

[96] MR. LOBEL: I just only have a few questions.

**REDIRECT EXAMINATION OF JAMIE FELLNER**

BY MR. LOBEL:

Q. Ms. Fellner, Mr. Landes read you a list of violent or disruptive activities and asked whether people who committed these types of offenses could be considered for supermax placement.

The question I have for you, are there many people who engage in those very activities that he mentioned who are not placed in supermax?

A. Yes.

Q. And—

A. And again it depends on—when I say yes, I can't speak specifically with regard to Ohio, though I have heard from people that there are people who have committed the same conduct who are on both sides of the supermax walls, but I know from nationwide that there is a great range of behavior that can lead you to supermax depending in part on the philosophy and approach of each, you know, jurisdiction.

Q. And Mr. Landes asked you about whether you favor—your report which said that high level officials should review periodically—

A. Yes.

Q. —these placements.

• • •

[97] Do you think these high level officials should review these placements on some criteria or should they review it based on some criteria?

A. I think the review needs to be based on, to the extent possible, on objective criteria as well as as much information as is possible that can be obtained about the individual from people who know the individual, the individual's history.

Predictions are very difficult and predictions of future behavior are very difficult, but you can't keep someone just indefinitely because the prediction is difficult, which is one of the reasons we argue for the need for some kind of independent or impartial hearing or scrutiny, so that if there are good reasons why an individual should be kept in supermax, those would be articulated.

But if it's just a kind of, "Well, he did this crime ten years ago, and, gee, well, let's just keep him here," that's not good enough.

Q. And Mr. Landes discussed your report in which you said that supermax—treaties, U.S. treaties are not self-executing, human rights treaties.



To your knowledge, have Courts ever held and ever cited these treaties, U.S. Courts, as evidence of what the contemporary standards ought to be?

• • •

## TESTIMONY OF PETER DAVIS

[100] characteristics, and what you heard is that the characteristics that you saw at Ohio State Penitentiary this morning are in fact typical of supermax prisons.

But you also heard there were some complaints that I think are fairly tied to discretion. It ought to be discretionary for Warden Ishee to decide whether corrections officers and inmates walking by are subject to having urine thrown on them.

And that was a weighty point.

Thank you.

THE COURT: Thank you.

Would the plaintiff call your next witness?

MR. VASVARI: Peter Davis, Your Honor.

PETER DAVIS, of lawful age, a witness called by the Plaintiffs, being first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION OF PETER DAVIS

BY MR. VASVARI:

Q. Sir, good afternoon. My name is Raymond Vasvari, I'm one of the attorneys for the plaintiffs.

Could you do us the favor, please, of stating your name for the record?



THE COURT: And please spell your last name.

THE WITNESS: Peter Davis, D-A-V-I-S.

[101] Q. And, Mr. Davis, are you employed?

A. I am.

Q. How are you employed, sir?

A. I'm a member of the Ohio parole board.

Q. And how long have you been so employed?

A. Since September of this year—excuse me, September of 2001.

Q. And prior to that, were you also employed?

A. Yes.

Q. In what position, sir?

A. As executive director of the Correctional Institution Inspection Committee of the Ohio General Assembly.

Q. And for how long did you hold that position?

A. Twenty-three years.

Q. You referred to the correctional inspection or Correctional Institution Inspection Committee, correct?

A. Correct.

Q. For purposes of expedience, I'm going to call that the Committee for the rest of my questions, okay?

A. All right.

Q. Thank you.

Could you explain to us first when you became the executive director of the Committee?

A. August, 1978.

Q. And what were your responsibilities in that position?

[102] A. Executive director for the Committee.

Q. And what did the executive director do?

A. Supervise the staff; direct, counsel and advise the legislative members who comprised the Committee.

Q. How many legislative members comprised the Committee?

A. Eight.

Q. And what was the distribution between the houses and parties?

A. Four members from the House, two Republican and two Democrat; four members from the Senate, two Republican and two Democrat.

Q. And just so we are clear, the Committee was a creature, an organ of the Ohio General Assembly, correct?



A. Correct, a statutory committee of the Ohio General Assembly.

Q. You had a staff when you were the executive director?

A. Correct.

Q. And how many people were on your staff, sir?

A. At the time I left there were seven.

Q. And when you began?

A. At the time I began there were four.

Q. Thank you, sir.

What was the mandate of the Committee? What was its function vis-a-vis the General Assembly?

A. The Committee was statutorily charged to inspect all [103] Ohio correctional institutions, to monitor the inmate grievance procedure, and to assist the Department of Corrections in making improvements to conditions, operations and programs.

Q. When you say statutorily charged, the Committee isn't sent from institution to institution by the legislature on a per case basis, but rather exists constantly and is constantly monitoring and investigating institutions?

A. That's correct. The Committee would go to institutions to fill the statutory responsibilities as the

Committee so desired, at whatever pace, whatever frequency and whatever schedule it so chose to set.

Q. What role did you play as executive director in setting the agenda of the staff with respect to these investigations and monitoring procedures?

MR. LANDES: Objection. I believe the testimony was inspections other than investigations.

MR. VASVARI: Inspections, I stand corrected, Your Honor.

A. Pretty much 100% as it came to scheduling staff to do what we would call an on site visit.

Q. Would an inspection always involve an on site visit?

A. No. If I could, we use the term inspection to include a visit to an institution where there was at least one legislative member present on that visit.

[104] Most of the time, a lot of the visits to the institutions were conducted by me or staff without a legislator being there. And those instances we referred to that visit as an on site visit. That's really the only distinction between an inspection visit versus an on site visit.

If it says inspection, that means a regulator was there.

Q. Okay. And an inspection visit has a legislator along?

A. At least one.



Q. At least one.

Did it come to pass at some point, Mr. Davis, that the Committee investigated or conducted an inspection of the Ohio State Penitentiary?

A. That's correct.

Q. Okay. Was that subject to an investigation or an inspection visit or an on site visit?

A. It was considered an inspection visit.

Q. And which legislator was in attendance that made it so?

A. Senator Robert Hagan.

Q. Was there one visit, sir?

A. There was one visit with Senator Hagan.

There had been a prior visit with Senator Ron [105] McLynd and then Representative Mark Mallory.

Q. So those would both be inspection visits?

A. Correct.

Q. When did those take place?

A. The inspection visits that included Representative Mallory and Senator McLynd would have been April of '99, I believe, or April of '98. April of '99.

And the inspection visit with Senator Hagan would have been November of '99.

Q. Were those visits preparatory to the preparation of a report by the Committee?

A. No.

Q. Did the Committee issue a report with respect to OSP that relied, at least in part, on information collected during those visits?

A. The Committee did not.

I issued a report to the Committee.

Q. I understand.

So the staff through you as its executive director issued your report to the Committee?

A. Correct.

Q. Was this fairly common practice in your capacity as executive director, to issue reports to the legislators who comprised the Committee?

A. Yes.

[106] Q. Okay. So this was the ordinary way in which you did things—

A. Yes.

Q. —as the ED?



Okay. Would you refer now in that large blue binder, Mr. Davis, to a document at Tab Number 11? And that's Arabic 11.

We've put it up on the screen here.

A. Okay.

Q. Is the report that you authored and issued to the Committee in connection with the Ohio State Penitentiary the same report that comprises Plaintiff's Exhibit 11 here?

A. Yes.

Q. Okay. Were you the sole author of this report?

A. Yes.

Q. And again, you did testify that you drew, at least in part, upon information you gathered during your inspection visits in drafting the report?

A. That's right.

Q. You also relied on another document which had been drafted by another group prior to the preparation of this report, in preparing this report, did you not?

A. Yes.

Q. I would direct your attention now one tab back to Plaintiff's Exhibit 10, and ask if the document displayed [107] there and now on your screen is the document upon which you relied?

A. Yes.

Q. And what is, for the purposes of the record, sir, Plaintiff's Exhibit 10?

A. It's the report of the quality review team which was the special committee of senior staff within the Department of Rehabilitation and Corrections that was tasked with looking at operations and conditions at the OSP.

Q. As the executive director of the Committee, would you have been familiar with the composition and the working of the quality review team?

A. I had not prior to receipt of that report.

Q. How did it come to pass, sir, that you received this report?

A. I received it in the context of a host of what I called advance materials that were assembled by the department in preparation for what turned out to be the inspection visit with Senator Hagan and Ms. Fellner.

Q. Were these materials that you requested on behalf of the Committee?

A. I did not.

These were materials which Ms. Fellner and/or Senator Hagan had requested the department to provide prior to Ms. Fellner's visit.

[108] I worked with Senator Hagan, with counsel for the department, with Director Wilkinson in trying to be the



facilitator of the gathering of a host of information prior to that scheduled visit.

Q. And so again, all of the materials that we are discussing here in Exhibit 10 were, to the best of your knowledge, compiled by and provided by the Department of Corrections itself?

A. Yes.

Q. Okay. Sir, I'd like to direct your attention now to numbered Page 2 of that exhibit, and we will put that up on the screen for your convenience as well.

Is it fair to say, sir, in preparing your own report, that is to say Exhibit Number 11, that you relied at least in part upon the materials displayed here on Page 2?

A. Yes.

Q. And forgive me, the copy that I have is fairly marked up.

Is it also fair to say that the quality team report was concerned, among other issues, with the placement of inmates to OSP?

[109] A. Yes.

Q. And also the level progression system by which inmates were given their security classifications while at OSP?

A. Yes.

Q. And also the retention of inmates at the high maximum status at OSP?

A. Yes.

Q. Okay. And in writing your own report with respect to the Committee or to the Committee, writing your report to the Committee with respect to those issues, you relied upon the conclusions of this DRC report at least in part, did you not?

A. I cited them. I cited portions of them, of that quality team's report in my report.

Q. Did you consider the portions you cited to be accurate?

A. I didn't judge their accuracy.

I judged the fact that they were saying—they were expressing similar concerns to what I had.

Q. So the concerns that were expressed in this report may have formed part of the basis for your concerns, and you would have arrived at those same concerns with or without this report?

A. It was very interesting to me, when I read the quality team report, to see that a number of senior officials in the Department of Corrections who were [110] reviewing some of these very same issues that I was looking at, shared a lot of the same viewpoint that I was feeling at the time.

And, therefore, I decided to quote portions of their report in my report to my legislative members.



Q. I see. Sir, I'm going to try my best to be technical and highlight a paragraph.

Oh, I've succeeded and Mr. Gilbert has made it go away, but I need this paragraph here, "when asked about the inmate population."

Do you see that report, sir?

A. Yes.

Q. Okay. When you read that paragraph, which indicates the business about the worst of the worst and the concept of being difficult to operationalize especially when going beyond 200 inmates who are, quote, clearly OSP material, close quote, was that conclusion contained as it is in the quality team report consistent with your own findings after the inspection visits that you conducted in 1999?

A. Yes.

Q. Okay. I'm going to go down to the next paragraph now and I'm going to ask you to read to yourself the paragraph that begins with "Further clouding the issue is the question of the fundamental purpose of OSP."

Do you see that?

[111] A. Yes.

Q. Was this conclusion that there was some ambiguity with respect to the fundamental purpose of OSP, consistent with your own conclusions after the inspection visits which you conducted in 1999?

A. I hadn't formalized a conclusion in my mind as to whether or not that was true.

I noted that it was very interesting that they had concluded that.

Q. And that was material you felt that it was relevant to pass on to the legislators themselves?

A. Yes.

Q. On the next page, Page 3, in boldface of the quality team report, there is a recommendation that the mission of the Ohio State Penitentiary be decided by a policy group at the highest level of the department in as much as a mission definition will drive programs and so forth.

This section here, Mr. Davis, is what I'm referring to.

A. Yes.

Q. When drafting your report, did you concur with this recommendation of the quality team report?

A. I didn't specifically cite that paragraph, I don't believe, or make specific reference to it, but I think in other places in my report I came close to that by stating [112] my concerns that it certainly will take high level decision-makers within the department to answer the concerns that, not only that I had, but that the quality team had also raised in terms of this clearing up the blending or overlapping in terms of the definitions as to who qualifies or merits placement either in administrative control versus high max versus high close versus maximum.



Q. And those concerns are on Page 2 of the quality report, in fact one of the paragraphs that you later cited in your own report, are they not?

A. Yes.

Q. That there was some sort of conceptual ambiguity between high max and general population and maximum, close, AC and maximum, and that these all tend to blend together, correct?

A. Correct.

Q. And that's what you were just referring to?

A. Yes.

Q. Thank you, sir.

Okay. I'd like to turn now to what may be the more familiar territory of your own report, Exhibit 11.

And direct your attention initially, if I could, direct your attention, please, to the fifth page in, and so this page here. And it may just be quicker if I put up my notes?

[113] MR. VASVARI: They have some highlighting on them, Your Honor.

Is that okay?

THE COURT: It's—either way. It's easier sometimes for him to follow where you are talking.

MR. GILBERT: I can do it.

MR. VASVARI: Let's do it from here.

THE COURT: It's underlined there, it's not a problem, as long as there is not just writing on them.

MR. VASVARI: Okay.

Q. On Page 5 of the exhibit, Mr. Davis, which is on your screen now—

A. Yes.

Q —is it fair to say that your inspection visits, the Committee's inspection visits and your report were also concerned with supermax placement, the level review system and retention?

A. That's correct.

Q. Okay. And that's expressed here on Page 5 of the report.

You make reference on Page 6 of the report at the bottom of the page and on the top of Page 7 to the quality team report again, do you not?

A. Yes.

Q. And, in fact, you make a reference to the fact that [114] the staff of the Committee regard many of the issues raised in the quality team report to still be ripe and salient, is that right?

A. That's right.



Q. At the time which issues did you still consider to be ripe and salient for review?

A. Primary issue, as to what specific kinds of assaultive or disruptive behavior would warrant classification to high max.

Q. And here you quote at length again from the quality team report.

May I ask why it is that you selected this particular language for the long block quote which is underlined in light blue?

A. Because it reflected so much of my own viewpoint that I had for a number of months prior to this, so in one regard it was somewhat reassuring to me that persons high ranking within the department who I know and whose opinion I hold in high regard happened to also see the same concern that I had long had about that very same issue.

So in composing my report to my legislative members, wherever I could offer not only my viewpoint but if it could be supplemented by offering them a comparable viewpoint by high ranking officials from the department to further highlight the issue of concern, then I felt it [115] should be brought to the attention of my members.

Q. Just for the sake of chronology, it's true, Mr. Davis, quality team report was issued in December, 1998, correct?

A. I—I trust that date is correct. I—

Q. And your own report was issued in November, 1999, in fact, November 20th, nearly a year later?

A. That's when my report was issued, right.

Q. Is it fair to say from your highlighting the concerns that you have in your report with respect to placement, the ambiguity of mission with respect to OSP, some of the concerns about retention, that in your opinion as you expressed it to the Committee, the concerns that were raised initially in December of 1998 had been substantially unresolved by November, late November of 1999?

A. As to those issues, that would be correct.

Q. Okay. I want to take you in a bit of a different direction before we return to the OSP now.

In your capacity as the executive director of the Committee, were you familiar with the Southern Ohio Correctional Facility at Lucasville?

A. Yes.

Q. In fact, is it not true, was it not true, sir, that a substantial portion of the Committee's attention was actually spent on addressing constituent and inmate [116] concerns that came from Lucasville?

A. That's right.

Q. There was a riot in Lucasville in 1993, correct?

A. Correct.

Q. And you as an adjunct or a man who reported to legislators who had a particular concern with corrections were privy, I imagine, to some measure of legislative or



policy discussions around the decision to build a supermax prison in Ohio, is that correct?

A. Yes.

Q. Did you form an opinion as to whether or not, sir, the riot at Lucasville played any role in motivating the decision to build a supermax penitentiary?

A. Yes. It's my opinion, was then and it is now, that the riot at Lucasville weighed in very heavily in the minds of legislators in deciding to build a supermax prison.

Q. There was a time, was there not, Mr. Davis, when the Lucasville was home to all of the maximum security beds in the state, is that true?

A. That's still true.

Q. There was a period when it wasn't true, is that not correct?

A. Correct.

Q. So it was true for a while, and then it wasn't true, and then it was true again, I think is how it worked, [117] right?

A. That would be correct.

Q. So there's a window wherein there were maximum security beds both at Lucasville and Mansfield, and then it was just Lucasville again?

A. Correct.

Q. When did that happen, the second part, when it went back to being just Lucasville?

A. 1992, I believe.

Q.And at that time, then, there would have been—the State's prison system, for purposes of background, is divided into a north and a south region, correct?

A. That's right.

Q. And after the moving of all of the maximum security beds down to Lucasville, there would have been no maximum security beds in the north region, right?

A. That's right.

Q. All right. After the Lucasville riot—maybe before, too, but it really doesn't concern us—there was a pod or a wing, a section of the SOCF called J-1, correct?

A. Yes.

Q. What was J-1? What is J-1?

A. J-1 is a self-contained cell block area of 20 cells located in the J block configuration of SOCF.

There are additional cell block [118] configurations as a part of that J complex as well, J-1, J-2, J-3 and J-4.

J-1 is the most restrictive cell block within the entire Lucasville penitentiary. And at the time, of course, was the most restrictive and isolated cell block in the Ohio prison system.



It was commonly referred to as J-1 supermax.

Q. And was that designation based in some way, sir, upon its similarity to supermax lockdowns in other facilities in other states?

A. It took that name J-1 supermax prior to really the proliferation of supermax prisons in other jurisdictions that had considered it a prison within a prison or jail within a jail.

Q. Demonstrably higher security than even other high security prisons in SOCF?

A. Tighter access, much more restricted, limited—limited personal possessions, limited movement in and out of cell.

Q. Reserved, I imagine, for the worst of the worst of the inmate population, then?

A. Yes, frequently—that term has been frequently used in the past two decades to describe—to describe that, to house the worst of the worst.

Q. Twenty cells on J-1 you testified, yes, sir?

[119] A. Yes, I believe it's ten on the lower range and ten on the higher range, but they are back-to-back. Five back-to-back at the bottom; five more back-to-back on the upper range.

Q. And in your professional capacity as executive director for the Committee's staff, did you have personal knowledge with respect to the utilization of those cells; that is to say, the degree to which they were utilized?

A. Periodically.

Q. Okay. I'd like you to focus now on the period between 1993 after the Lucasville riot, prior to May of 1998 when OSP opened.

During that time, was J-1 ever fully utilized? Were all 20 cells ever used?

A. Not to my knowledge, it was not.

Q. Is it fair to say that during the majority of that time, J-1 was less than half full most of the time?

A. Yes.

Q. Let's go back to your report, now, if we can, which is Exhibit 11.

I'd like to move forward, if I can, to the ninth page which is displayed here on the screen toward the bottom.

At the end of this paragraph where I've marked in red, you cite the quality review team report for [120] the proposition that the 200 or so inmates who are clearly OSP material being quoted as a phrase or raised as a concept in the quality team report lead you to question whether there was an ongoing genuine sustaining need for 500 supermax beds in this state, is that correct?

A. Yes.

Q. Tell me, sir, why it is that you came to that conclusion?



A. Partially because during the period of time from immediately after the riot until the time that OSP opened, and as we have just talked about in terms of the utilization of the J-1 supermax beds not being fully utilized, but the greater concern for me and why I wanted to stress that with the members of the Committee was that one—and again, if you keep in mind, my report was crafted for my legislative members not knowing to what extent the Committee of legislators were going to want to further engage this issue, the overall issue of concerns regarding Ohio's supermax prison, the complains and concerns that inmates had written about, the concerns of Ms. Fellner that her visit had raised, the concerns of the department.

My hope was to try to frame a report that would embrace those issues that I felt were most critical for the members to be aware of, and in a proper context.

[121] And the most important aspect of that for me in helping to frame the issue was that the legislature should not try to address the issue of the State's supermax prison without understanding the context for the continuing need for additional maximum security beds for the system.

In other words, the decision in 1992, pre-riot which lead to the return of all of the maximum security inmates from the Mansfield institution back to Lucasville, therefore leaving Lucasville once again as the only maximum security prison, that problem or that shortage of maximum security beds became a problem then.

Our committee as a committee at the time cited that return of maximum security inmates back to Lucasville as one of the contributing factors to the riot. And here we are at that time by 1999, the State still didn't have enough maximum security beds.

So I did not want the members of my committee to begin discussing, if they so chose, how to resolve these issues related to the State's supermax prison without them feeling a legitimate need and concern to embrace the preceding issue which had still never been resolved of the lack of maximum security beds in the northern half of the state as well.

So the two can't be divorced in my view, at least in the context of trying to help frame a legislative [122] response, if there was going to be one.

But you can't talk about the issues, concerns, problems, what to fix, what not to fix, what to leave alone at OSP without understanding the proper historical context of what else is helping to drive some of that problem related to those issues at OSP.

And in that regard, the lack of additional maximum security beds was the most critical issue and problem, in my view.

Q. Now, Mr. Davis, when you qualify your answer in that way, I am assuming that as a man who for 26 years reported to a bipartisan, bicameral commission, that you felt a professional obligation to put the whole set of facts before your legislators when you issued this report, is that fair?

A. That's fair.

Q. Did you conclude, Mr. Davis, and in fact is it not included in your report, the conclusion that the lack of adequate maximum security beds in the northern region of the state provided strong institutional incentives to classify



inmates who are otherwise not to be classified at high max as high max?

A. I personally didn't conclude that.

I think I worded it such that—I think the words I said were "some may say," "some could say," "some [123] presume," "some may presume" that that may be a motivation on the part of department officials to keep that 500 facility supermax prison full.

I didn't cite it as my finding or my conclusion. In fact, I took pains to make sure in drafting this report that I didn't make findings or recommendations to the legislature.

Q. I'm going to direct your attention, not to disagree with you, but just to clarify what it is you said, Mr. Davis, to Page 10 of your report and the second full paragraph which I'm highlighting now.

A. All right.

Q. In green this time.

Is it fair to say based on that paragraph, sir, that you concluded that at least there is a strong institutional temptation to abuse the classification process as a means of justifying the continued existence of 500 high max beds in the state?

A. Well, again, as I started that last sentence of that paragraph, some would argue that it's easier and more expedient to make those kinds of case by case justifications than to justify—I'm simply pointing out to the members of my committee that this kind of argument, this kind of

accusation against a department is ripe for someone to make. A lot of folk already feel that way.

[124] But I think I word it—worded it carefully enough so that the members wouldn't necessarily conclude that that was my view.

I'm not a shy person. If when I want to make findings and recommendations to my members about issues and concerns relating to Ohio's prison system, I've never been shy about doing that. And I have publications and reports and praecipes that clearly don't show my shyness.

So I don't hesitate to state my clear point of view, if that's my point of view.

But I felt obliged to let them know this is an argument that's going to leave the department open for a lot of criticism from a lot of corners because politically some could argue, "Well, of course, they've got to keep that 500 bed prison filled and they will keep that filled."

And people will make that argument and the legislators need to know people will be making that kind of argument.

Q. So this is by way of fully informing them of what the public policy questions are?

A. Again trying to frame the issues as best I can and in as full a context as I can presenting, hopefully, an objective both sides of the argument and issue to write the report. Hopefully I did that.



Q. You just testified, Mr. Davis, that you are not a [125] shrinking violet, and I think we have in the paragraph above the one I just highlighted evidence of that very fact.

You write that serious questions remain with respect to the selection of inmates who are designated to be sent to the supermax.

Was that your conclusion in November of 1999?

A. Yes.

Q. And is it not true and do you not also conclude, if we go up a paragraph more, that the system, when you reviewed it, was such that there were inmates in the supermax who were there for pretty egregious conduct, but by the same token there were other inmates elsewhere in the system who were guilty of similar rules infractions but didn't get sent to the supermax?

A. That's correct.

Q. Was that a serious problem, in your mind?

A. It was a serious problem just in terms of trying to understand the application, the fair and objective application of the criteria, and to try to dispel or have a better understanding as to what appeared to be disparate treatment.

Q. In your mind, Mr. Davis, were the criteria objective and objectively applied at the time you wrote your report?

A. You'll note that I didn't make that conclusion one [126] way or the other in my report.

Q. I'm asking you, sir, to make it now, with all due respect.

A. It's difficult to say.

The only thing that's clear is, as I've said here, for every inmate that was cited to me and the reasons why that person was sent there, for this particular act, this assaultive behavior, if you will, we knew for a fact of plenty other inmates that were at other institutions, even close security institutions, that were not transferred there.

My frustration was trying to understand how the criteria was being applied, whether or not it was being applied consistently at all institutions on referral, whether or not it was being applied consistently at central office level in those determinations.

Just simply was no way to understand how one assaultive inmate could get high max placement and other assaultive inmates could not.

My frustration was one in search of clarity.

Q. So truth be told, Mr. Davis, you did, in fact, conclude that the criteria weren't being objectively applied given this disparate treatment, is that not true?

A. They certainly weren't being consistently applied.

MR. VASVARI: Thank you.

[127] THE COURT: Let me ask a question myself.



You testified that there were too many or insufficient number of maximum security cells and perhaps too many high maximum security cells.

Is that still the situation today or has it changed?

THE WITNESS: It's—the situation in my view, Your Honor, is still the same.

THE COURT: Too many high maximum security cells and too few maximum security cells?

THE WITNESS: Your Honor, I'll stop short of whether there are too many high max beds.

I—I don't have a basis to know whether or not 200 or 500 supermax beds are needed.

I think I have a stronger opinion that a lot more maximum security beds are needed, similar to what used to be the case before those beds were lost at Mansfield.

THE COURT: And how many are you talking about? How many were lost at Mansfield or how many do you think are needed now?

THE WITNESS: What was that number?

There were at least 500 maximum security beds, I believe, at Mansfield. At the time Mansfield was housing a dual population; part of the population was maximum security, part was close security.

[128] And I believe there was close to 500 beds total that were designated for Mansfield to help alleviate some of the problem at Lucasville.

THE COURT: 500 maximum security beds?

THE WITNESS: 500 maximum security beds, I believe that was the—that was the number.

THE COURT: Do you have any other questions?

MR. VASVARI: Not many, Your Honor. Maybe five minutes. I was hoping you might give me 15 seconds to confer with co-counsel before I go on.

THE COURT: Okay.

MR. VASVARI: Thanks.

(Pause).

MR. VASVARI: Your Honor, my guess is less than five minutes.

THE COURT: Go ahead and ask your questions.

MR. VASVARI: Thank you.

BY MR. VASVARI:

Q. You also concerned yourself in the report you drafted in 1999, Mr. Davis, with exit criteria from supermax, did you not?

A. Yes.

Q. And did you conclude in that report that there was a sense that the level progression system through which inmates had to work in order to ultimately earn their



* * *

[133] I'm just going to wrap up now by asking, you said until September 10th of last year you were the executive director for the Committee staff, correct?

A. I began my new position with the parole board September 10th of 2001.

Q. Okay. So when did you complete your tenure as the ED?

A. June 30th.

Q. Okay.

A. 2001.

Q. So early summer, 2001.

Did you remain aware, did you keep up to speed with issues and concerns about the OSP until you left that position?

A. Yes. Periodically, of course, we would try to do as best we could with all 30—I think by that time 33 prisons.

Q. When you left, were the concerns that you had about initial placement at the OSP resolved to your satisfaction, satisfactorily addressed by the Department of Corrections, or did those issues remain outstanding?

A. I couldn't say that they were thoroughly resolved to my satisfaction, but that's, one, because it wasn't as

pressing a high profile priority issue for my staff, for me and my staff by that time.

[134] Q. But fair to say, if we were to take a snapshot at that time—I'm not trying to trick you up. I don't want to make you say what you don't want to say.

A. Yeah.

Q. But if you looked at it on June 30th, 2001, the concerns that were raised in your November 20th, 1999 report vis-a-vis placement, those concerns were still there?

A. I can't say definitively.

I can say that by June 30th, by the time I left, I had certainly stopped hearing from a number of inmates at OSP who had originally been saying "I don't even know why I'm here. No, I haven't had a hearing, no one's told me what I did to get"—those kind of complaints had dissipated.

But I think your focused question is whether or not I knew or felt or believed that the department, through its efforts, had somehow reached a clearer distinction between the various classifications and divisions; in other words, what kind of behavior can get someone in administrative control versus local control versus high max versus max.

I wouldn't say that—that I had any assurance that those blended categories had been—had been made more distinct than they had.

[135] Q. Just one or two more questions, Mr. Davis.

The same question with respect to your attention to level progression.



Do you feel that those issues had been satisfactorily resolved by the department by the time you left?

A. Again I don't know. The level of involvement with me on that institution beginning in the year 2000 was much more minimal.

Whether or not, again, the department had made significant improvements to that exit or level progression system and how an inmate flows through that or can earn his way through that process, the number of inmate letters to my office through the year 2000 as well as the focus of my office on OSP during the year 2000 was diminished.

So it wasn't like by the time I left I was able to do as focused a follow-up study to compare it with my 1999 belief.

Q. Do you have any reason to believe, any specific information that would lead you to conclude that things had substantially improved?

A. Oh, I had heard certainly throughout the year 2000 and into early 2001 that a number of operational changes had occurred there.

[136] That there had been some added privileges or added video programming that was allowed, that they had—

Q. If you'll excuse me, if I can just for one second, Mr. Davis, those changes you are describing deal with the conditions of confinement but not with the issues of retention and placement?

A. Right. Again as to placement, I don't know.

It's not like I reviewed the department's policy by the time I left because my leaving wasn't forecast. It was a matter of budget, a budget thing that came out of the blue.

So it's not like I had planned or had done a follow-up status, comparative piece a year later, compared to what this was. And that was mainly because there was no legislative push for me to do it.

Q. And you reported to the General Assembly then. You report to Director Wilkinson at the ODRC now, don't you, ultimately?

A. In my new position as parole board member, I'm appointed by the director with concurrence of the Governor.

Q. One last question.

With respect to your conclusion in 1999 that there are inmates in other institutions around the state who have conduct just as egregious as some inmates sent to OSP when you left in June of 2001, do you have any reason [137] to believe that that had changed?

A. I know that had not changed.

MR. VASVARI: I have no further questions. It's been a pleasure taking your time today, Mr. Davis.

Thank you, Your Honor.

THE COURT: Thank you.

Are you going to examine him now or in your case?



MR. LANDES: I would prefer to examine him now. He's come up for the day.

THE COURT: Any objection to that? I would think it would make sense, being a nonjury trial, that we would take all the testimony now.

So understanding there's no objections, I'll allow cross-examination which would in effect almost be direct examination.

MR. LANDES: Thank you. Understood, Your Honor.

**CROSS-EXAMINATION OF PETER DAVIS**

BY MR. LANDES:

Q. Your committee never argued that inmates at OSP should not be there, is that right?

A. That's correct.

Q. And in your experience, it's not unusual for an inmate to jump more than one classification when he's

* * *

[140] Despite these, the conduct noted, is that right?

A. That's right.

Q. Okay. We can turn that off. Thank you.

It's fair to say that you don't know what the department has done to make the distinctions clearer

between, let's say, administrative control in Ohio State Penitentiary since you left your position?

A. That's fair.

Q. And it's also fair to say that those cases in which you identified similar kinds of behaviors, at least from the outside, that weren't at OSP, that a warden has to ask for a transfer, is that how it works?

A. That's right.

The warden would make a recommendation to central office classification.

Q. And if the warden has bad conduct in his institution but does not ask for transfer, that person, even though they may have done something similar to the person now at OSP, wouldn't ever go to OSP?

A. If central office is not made aware of it, he certainly couldn't go to a higher, higher level.

Q. Okay. Do you agree that subjective professional judgment is required to make these transfer and classification decisions?

[141] A. Yes. Absolutely.

Q. Okay. Concerning notice and due process for inmates transferred to Ohio State Penitentiary, as of the year 2000 you did not hear an issue any more from the inmates, is that fair?

A. That would be a fair statement.



Q. And you have not been there since November of 1999?

A. That's correct.

Q. And you don't know the current and ongoing conditions at Ohio State Penitentiary, do you?

A. That's correct.

Q. As a parole board member, you've never had the situation where an inmate would have been granted parole but for his placement at OSP?

A. I have not.

MR. VASVARI: Objection.

A. I have not had that experience.

MR. LANDES: Thank you.

That completes my examination.

THE COURT: Do you have any redirect?

MR. VASVARI: One or two, Your Honor

**REDIRECT EXAMINATION OF PETER DAVIS**

BY MR. VASVARI:

Q. Mr. Davis, when you told Mr. Landes that you would agree that subjective professional judgment is necessary to

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**TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE JAMES S. GWIN, JUDGE OF SAID COURT, ON WEDNESDAY, JANUARY 9TH, 2002.**

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**VOLUME 3**

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**TESTIMONY OF TODD ISHEE**

[599] Mansfield Correctional Institution, isn't it the case that the exchange of such materials is not only a common

practice, but is generally permitted by the correctional authorities?

A. I wouldn't say generally permitted.

I think it does occur, but the—the prisons and the department doesn't sanction inmates violating rules.

Q. Continuing, Mr. Ishee, with our exploration of policies that you have continued and created or discontinued, would you agree with this statement: Confinement at OSP is not intended to punish inmates. The central purpose of confinement at OSP is to control the inmates' behavior until they demonstrate that they can safely be moved back to a facility with a lower security level?

A. Yes, I would agree with that.

Q. Finally, Mr. Ishee, I want to ask you about just two or three specific inmates who have not testified but whose records, I think, have some relevance.

MR. LANDES: Your Honor, may I interpose an objection to the use of this document which was not on the witness list, is not being used for impeachment, has not previously been handed to the defense team?

THE COURT: What is it? What is it?

* * *



## TESTIMONY OF BERNARD RYZNAR

[618] Q. And do you refer to it and abide by it in the course of your ordinary business?

A. Attempt to, yes.

Q. Okay. Would you tell us what function 5120-9-21 plays with respect to the classification and transfer of inmates?

A. It is the administrative rule that covers interinstitutional transfers of inmates.

Q. Your office, Mr. Ryznar, must approve every inmate transfer between institutions in the State prison system, is that correct?

A. Is that a question? Maybe could you ask it again? I'm sorry.

Q. Okay. If an inmate is to be transferred from one prison in this state to another, that transfer must ultimately be approved by your office, correct?

A. Correct.

Q. And, in fact, you are the person who approves those transfers, is that not correct?

A. I'm the one that authorizes it, correct. It's under my name.

Q. There came a time when the State built a maximum or high maximum security prison at Youngstown that this case is all about.

You remember that?

* * *

[638] every high max case that came before you?

A. My recollection, I did.

Q. How many high max cases come before you annually?

A. I can—it varies from year-to-year.

I think it's probably under a hundred a year for review—wait a minute.

I'm sorry. That's not correct. That's not correct.

I was thinking of initial placements.

Every inmate that's there should be—I should be getting an annual review.

Q. Okay. So at times as many as 450 a year?

A. Currently about 334, I believe.

Q. Okay. In addition to the hundred additional placements that you just mentioned, correct?

A. Correct.

Q. And in addition to that, Mr. Ryznar, how many other reviews come to your attention a year, require your approval?



A. That's very difficult.

That's—I get the—routinely I do maximum security reviews as well as AC placements, recommendations.

Q. Am I correct in believing there are about 48,000 prisoners in this state?

A. No. It's 44,400 and some.

[639] Q. You would know better than I. I'll take your word for that.

Am I correct in believing that anytime one of those 44,000-odd inmates moves from one institution or another on a security classification change, it requires your approval?

A. It requires approval of the Bureau of Classification, right.

Q. Does it require your signature, your review?

A. It's—the approval is under my signature.

Q. Okay. How many of those cases do you review annually?

A. Personally?

Q. Yes.

A. Just the ones that deal with AC, max, high max, or if they are brought to me if there's a question about the placement.

Q. Is that a thousand cases a year?

A. I'm uncertain.

Q. We know at least 300 supermax cases a year or more, don't we?

A. Right. That's correct.

Q. In addition to those placement decisions, what are your other responsibilities as the head of the Bureau of Classification?

* * *





[792] including before 2001.

A. Approximately 661.

Q. How about just in 2001 alone?

A. Approximately 124.

Q. Of the 661, how many—well, how many are still there?

What's your population today?

A. 330.

Q. And out of the 124 that have transferred in in 2001, how many transferred out?

A. Approximately 42 during calendar year 2001.

Q. Is that backwards, Todd? Perhaps I asked it the wrong way.

How many transferred in in 2001? Is that 42?

A. That's the 42, that is correct.

Q. And how many have transferred out in 2001?

A. 124.

Q. Thank you.

A. That was in 2001. I'm sorry.

Q. Would you—from your perspective, what you have seen as the inmates have come in, can you describe the process that an inmate goes through to get transferred to OSP as you've seen it during your time there?

Does that normally start with a Rules Infraction Board?

[793] A. In almost every case, yes. There's a—with the exception of the initial activation, and I'm speaking now as of what's happening currently, generally everyone that is initiated through a recommendation from the Rules Infraction Board as a result of a guilty finding for violating a rule of conduct.

From that point, the inmate is referred for high maximum placement, brought before a committee. Prior to that committee, there is notice provided to the inmate.

The inmate appears before the committee, is given the opportunity to speak on his own behalf. There's not really any limitation on what the inmate—what kind of information can provide—provide the committee with.

Generally it's surrounding reasons why they are objecting to placement in high maximum.

After considering all the evidence that the committee has, they make a recommendation. It's forwarded to the warden of that institution. If the warden concurs, that recommendation is forwarded to—forwarded along with all the related reports and information to the Bureau of Classification to where the chief makes a final decision on placement at the Ohio State Penitentiary.



Q. If I can go back to the Rules Infraction Board, the Court heard a lot of evidence during cross-examination of the inmates as to the process of that.

[794] But we've only seen guilty findings.

Have you been involved in Rules Infraction Boards?

A. Yes, I have. I've served as the chairman of the Rules Infraction Board at both Lorain and Trumbull Correctional Institution.

Q. What is your experience with how these things come out?

A. There are not guilty findings.

I think the statistics show that probably a majority of the cases that go before the Rules Infraction Board, there is a guilty finding, but there is a percentage of not guilty findings.

THE COURT: Any sense what the percentage is?

THE WITNESS: Your Honor, it probably varies from institution-to-institution.

I would say during a—maybe around the 10% may be a—a

THE COURT: Not guilty?

THE WITNESS: Yes.

BY MR. LANDES:

Q. You also mentioned a separate process for a transfer to high maximum, is that right?

A. Yes.

Q. In your background, what opportunity does an inmate [795] have to make a statement as a part of that process?

A. As a part of the high maximum process?

Q. Right.

A. The inmates are afforded the opportunity to appear before the committee in person, and make a statement. As I said earlier, there's really not any limitation on what can be discussed during that hearing.

My experience has been it generally surrounds around reasons they feel why they should not be placed in high maximum.

Q. You had some experience with that when you were at Mansfield Correctional, didn't you; some people getting transferred from there to Ohio State Penitentiary?

A. Yes, I did.

Q. What was your experience in the kind of forms or process that was used there, that you used there?

A. The process that was used at Mansfield during my tenure was—was in total compliance with the department's policy on high maximum.

Q. Did you make up your own form?

A. Yes, we did.



There was a—there was a period of time where there was not a DRC form that was universally used. So we did create a form in order to guide us through the—through the process and ensure that we maintain [796] compliance with policy.

Q. And that would have been back in '99?

A. '99 and the first half of 2000.

Q. Mr. Ryznar has already talked about the process that will be ongoing when the new regulation becomes effective.

Is it your experience, though, being out there as the warden, that the inmates, for instance, take advantage of their process on appeal?

A. Yes, they do.

Q. And how do they do that?

A. The appeal process available to the inmates is a written opportunity.

I think—I think based on my experience at OSP, virtually all exercise their right to appeal. The exceptions are generally when there is a reduction recommendation. Those generally are not—not appealed.

Q. Oh, okay.

I'm showing you what is part of—actually it's Defendant's Exhibit 5, and it's a form that we've seen many times.

It's what's been called sometimes a security instrument or the supervision reform—review form, that form that has pluses and minuses and such.

I'd like you to tell the Court how that's used and what value it has as applied to decisions about [797] high maximum?

A. This is used in every case that we do an annual security reclassification conference.

The form is filled out at the institution. It's considered at the committee level. It's a tool. It's not—the form does not bind the committee to agree with the form.

There is opportunity for the committee to disagree and change their decision either way.

Q. Okay.

A. I use this form as part of—part of my review.

I use it as one of several tools or considerations that I give in making the—my recommendation.

Q. If you want a paper copy, it's there in your binder under F.

A. Okay.

Q. Would you look at some particular aspects of it and tell the Court, please, how those things sort of dovetail with the kind of considerations you need to make for high maximum and the kinds of circumstances that an inmate at OSP finds himself in?



A. Okay. I'll begin with Number 1, finding of Rules Infraction Board.

Although this is applicable, it's been my [798] experience that an inmate confined at OSP, it's because of the environment, the opportunity to violate rules is not as great as it is in a general population or an open setting prison.

So although this is a factor, it's not quite as meaningful as it would be at other facilities.

Q. How about Number 2, administrative control?

A. Number 2 is not very useful at all.

The inmate, by the time they come to this, they have generally been at OSP for a year, and OSP does not have LC or administrative control. So this, this particular section is not that valuable, in my opinion, related to high maximum.

Q. They are almost automatically going to get a zero or they are—

A. In almost every case, yes.

Q. How about Number 3?

A. Number 3 is—it applies to high maximum.

Certainly there's—there's strong consideration given to offenses that meet that category.

Q. How about Number 4?

A. Number 4 is very similar to my explanation with Number 1.

Q. Under stability factors, are there ones that you feel that you need to tailor in order to consider continued [799] placement at Ohio State Penitentiary?

A. The educational section we do for the inmates, the opportunity to earn their GED. I'm very proud of the work that the education staff does. During calendar year 2001 we had 43 inmates complete the requirements and earn their GED.

The factor with this is that because so much of our education is done in a one-on-one basis as opposed to a general population facility where a teacher may be able to spend their time with 30 students instead of one, I—that factors into the—into the decision there. How about jobs at OSP? How does that come into play with Number 6?

A. We assign jobs basically at two levels.

The inmates are assigned a job as a porter of their cell which means we require them to maintain acceptable levels of hygiene and sanitation.

There are, in the facility right now, 24 inmates who are assigned as a pod porter, and that is more of a meaningful job. They are responsible for a larger area.

They are out of their cell. They are moving throughout the entire pod and responsible for the general sanitation of the area.

But there again, we are a little bit [800] different. I think there's a significant difference in being a porter versus



assisting an electrician or a more responsible job that are jobs that are available in general population facilities.

Q. So they get a minus one for no job removal if they clean their room?

A. Correct.

So, you know, my—I don't put as much weight in that, that particular category either.

Q. I'd like you to look at Exhibit, Defendant's Exhibit H, and this is a document that we've seen before, sometimes filled out.

This is the—we've talked about classification. Now we are talking about what's been called reclassification.

Could you describe the process as it applies to OSP, what actually happens on the ground out there? We don't really need to look at the form.

A. Could you repeat the question, please?

Q. Sure.

Do you have a board that shows up at OSP?

A. Yes. The review process begins with, again, a notification to the inmate of an annual review. A three-person panel is assembled; a representative from the mental health staff at OSP, a deputy warden from OSP, as [801] well as a central office representative.

The inmate's brought before the committee in person, and is able to express their—here again basically whatever they would like to.

Q. Have you seen these things actually happen?

A. Yes, I have.

Q. Okay. And what, what kinds of things are considered or what kinds of things do the inmates put on?

A. The inmates generally appear, and the scope of their communication with the committee is reasons why they think they should be returned to maximum security, which is the next step down from the Ohio State Penitentiary.

Q. Are there any limits on what the inmate's allowed to say?

A. No, there aren't.

They are free to discuss with whatever they want, within reason. I say that by—I don't think it would be efficient for us to permit an inmate to discuss an unrelated topic for three hours, so the committee will guide the inmate towards confinement, classification issues, et cetera.

Q. Do they have 800 minutes? I'll withdraw the question.

THE COURT: Will they have 800 minutes after this experience?

[802] THE WITNESS: They may, Your Honor.



Q. Does the committee run year-round at the institution?

A. Yes, once per month.

Q. Okay. What role do you have in this process and how do you do it?

A. My role is to review the recommendations of the committee as well as all of the factors that are available to me to make a, you know, classification recommendation on the inmate as far as retention or release.

Q. What kind of time do you spend on each one?

A. I think it varies, depending on kind of a case-by-case basis.

If I had to attach an average, I would say approximately 10 to 15 minutes per case.

There are some that go quicker and there are some that are a lot longer.

It's not uncommon for the process to take longer if I need to make telephone calls. It's very common for me to send the packet back to the human management staff for additional details.

I consult with staff at central office, mostly with STG things, consult with that office.

So it just, it kind of depends on a case-by-case. But I'd say approximately 10 minutes on an average per case.

[803] Q. Do the inmates talk to you about this?

A. No, they don't, although there are times when I think there's a need to talk to the inmate, and I go have a conference with the inmate myself and ask them for clarification or reasons why they think they may be able to be safely managed at a lesser secure level.

I have found that to be particularly meaningful on cases where—that are very close in the decision on whether to retain or release.

Q. After the decision is made on reclassification, how is the inmate informed and how is that information handled and why, at OSP?

A. Once the decision is made and throughout this process, I'm a recommender, so my recommendation is forwarded on to the Bureau of Classification and then ultimately to the regional director for a decision.

Once we receive the decision of the regional director, we have a form that's produced by the unit management administrator which represents a summary of reasons for retention or reduction. The form is forwarded on to the inmate.

So they do receive a written notice of the decision.

Q. How is that actually given to them?

Is the unit manager or some other person [804] involved in that?

A. Yes. Generally, the unit staff and in most cases the case manager personally forwards the notification on the inmate.



Q. Why is it that they are not given the actual form?

What is the—the security interest in not handing that form out into the inmate population?

A. At times there are—there's information on the document that we spoke of earlier that could result, in most cases, in a safety issue for the inmate.

Once we hand out a copy of a paper to an inmate, we lose control of that. That form could wind up in the hands of another inmate.

There sometimes is information about Security Threat Groups on there, and to ensure the safety of the inmates, I've decided that it's best that we can provide them with a summary and occasionally omit information that could potentially cause harm.

Q. Do inmates at Ohio State Penitentiary get other reviews, things like behavioral management reviews?

A. Yes, they do.

And these are separate and aside from the security classification reviews that are done annually.

The behavioral management team, at least a representative from this team, meets with the inmates after their initial [805] 90 days, then every six months thereafter.

The purpose of the team is to—is two-fold. First, to monitor compliance with the behavior plan. The second function that the committee has is that at any time they are permitted to, if they feel that the inmate may be ready for a

reduction in security classification, can make a recommendation to me that we do a special security instrument.

And under our current policy, I have the authority to have a special security evaluation done on any inmate at any time.

So although we say that the security reviews are done annually, we still can do those virtually at any time.

Q. You heard Inmate Eskridge complain about being put on Level 1 and it being found through the inspector to have been incorrect.

Does his file indicate that he was put on Level 1?

A. We have deleted the information. That there was a mistake made, and we've corrected the record so that it does not reflect a Level 1 placement.

Q. Okay. Warden Ishee, when an inmate first gets to OSP, do you routinely doublecheck why they are there and whether they should be there?

[806] A. Yes, I do. Actually we kind of double doublecheck.

I personally review the cases of all placements at OSP, as well as do the unit management staff during the orientation process.

Q. And how long after they arrive is the orientation process?

A. In almost every case, within five days.



Q. Have you ever turned people around and put them back on a bus?

A. Yes, I have.

Q. Under the new policy, do I understand that there's going to be additional reviews to—for Level 5?

A. Yes. The new policy will—will mandate reviews for the 5-B level inmates once every 90 days, and for the 5-A inmates once every six months.

Q. We have talked about the fact that out of the 661 that have walked through the door, about half of them have walked back out.

Did I figure that about right?

A. Yes, you did.

Q. In your experience is the process of deciding who to retain a sham?

A. No, I think it's—it's very meaningful.

Out of the over 300 that we have returned to a lower security level, to date only three have returned.

[807] And I think that that percentage of return is—is is—would stand up as a best practice across the country.

Those numbers, I think, are remarkably low, and just kind of a tribute to the kind of program that the Ohio State Penitentiary runs.

Q. Did you check all the files of the inmates who testified here?

A. Yes, I did.

Q. And did they all get a reclassification hearing?

A. Yes, they did.

Q. Did some get more than one?

A. Yes.

Q. I'd like to have you tell the Court about what kind of people you have at Ohio State Penitentiary.

And to assist the Court, did you do inmate profiles?

A. Yes, we did.

Q. And those are at Exhibit I?

A. Yes.

Q. Who did those?

A. Primarily the unit management staff. Those are the folks that handle most of the classification-related issues.

There were some other staff that participated [808] in the process. It was a—we tried to be as very thorough as we could during this.

The profiles are a culmination or summary of information contained in the master file, the unit file, and the



RIB file. To ensure accuracy, we were provided information from the Bureau of Classification reception also.

THE COURT: What are you referring to?

MR. LANDES: There are four or five binders, Your Honor, that are all marked as inmate profiles, and we called them all Exhibit I, but there are several binders of them. There are—

THE COURT: They are—

MR. LANDES: And I thought they had been put up next to your bench. Are they over there in that box?

They are not up there yet, Your Honor. We left you some space.

THE COURT: Okay.

THE WITNESS: Your Honor, what we did with those were—it's a summary of the inmates at OSP, of heir criminal history.

THE COURT: Okay.

THE WITNESS: As well as serious conduct [809] violations that occurred during incarceration.

It's not an all-inclusive record of conduct violations. It's only the very serious ones.

And then the final page is a summary of the circumstances which caused placement at OSP and then the corresponding—

THE COURT: Okay. I'm not sure I need them right now.

MR. LANDES: Okay.

THE COURT: But I just didn't see them in the—up here, and I wondered.

MR. LANDES: Glad you told us.

BY MR. LANDES:

Q. Who is included in these profiles, which inmates?

A. All the inmates at the Ohio State Penitentiary that were there at the time of completion, as well as have been received since then.

The only exception to that was at the time of completion, we did not complete one for inmates who have—who had been approved as a reduction to maximum security.

Q. And about when was that done?

A. That was done in the spring of 2001.

Q. Is there also a summary of the profiles or a summary of the summary for the Court at Exhibit J?

Take a look there.

A. Yes. This is a—a brief summary of the profiles.

[810] Q. And does this include everybody that got a profile?



A. Yes, it looks like the first three pages are profiles of inmates directly named in the—in this case, and then the remaining pages are an alphabetical summary of all the inmates at OSP.

Q. I see it has a profile page.

What does that refer to? Does that refer to the Exhibit I, to the more full description? Do you see the last column?

A. Oh. Yes. Yeah, that's correct.

Q. You've—the Judge has heard from 13 of the inmates.

Can you talk about some representative inmates or so in here that would help the Judge understand what sort of person that you are required to house there?

A. Sure. I—I—I'll just kind of flip through.

A couple names off the top of my head, an inmate by the name of Dustin Might, M-I-G-H-T.

Q. What about him?

A. Inmate Might was housed at Lorain, TCI and SOCF and is a very dangerous man.

TCI, he killed his cellmate in local control with his bare hands.

He beat the inmate's head off the concrete floor of the cell and caused his death.

He was transferred to SOCF, and while in [811] administrative control with a weapon cut the throat area of an inmate.

Was released from local control, and very seriously assaulted an inmate at SOCF, nearly causing death. And the assault was so serious that the reports indicate that the victim was life-flighted to a hospital.

Q. Let me ask you to give the Judge generally an idea of what kind of people are getting sent there to OSP.

What sort of categories, if you can categorize them?

A. Okay. We've talked a lot, Your Honor, about the Security Threat Group.

I don't have too many of the STG leaders or enforcers. There are some.

I think—I think out of the 330 I have right now, those that are listed for sole STG placement is below five.

Obviously we have inmates who have committed very serious assaults on other inmates or staff, and these are assaults where the victim has received substantial injuries and in almost every case required hospitalization.

So these are not the kind of inmates that push an employee or something of that nature.

I have inmates who have killed other inmates while incarcerated. I have inmates who have killed [812] employees of ODRC. I have inmates who have escaped from ODRC facilities or made very serious attempts to escape from prisons in the State of Ohio.



Q. What did you tell the Judge about drug involvements in being sent to OSP?

A. We do house inmates with drug offenses. These drug offenses are not your typical prison drug offenses.

It's—we limit placements in high maximum to inmates with mass quantity drug offenses; ounces of marijuana, for example, or large amounts of cocaine or heroin.

The other type of inmate that's there on a drug offense are inmates who were caught in possession of drugs that were packaged for distribution. An inmate may have—may have been found in possession of 20 packets of drugs that he intended to distribute across the facility.

So our drug offenses are strictly limited to very severe cases.

Q. What have you seen in your experience in other institutions is the result of having drugs in a prison?

A. Drugs in prison are a very, very serious issue.

In addition to being against the law, drugs, inmates who are under the influence of drugs often engage in assaultive behavior, hurt other inmates, hurt employees.

Drugs are affiliated a lot of times with [813] prison gangs or STG members. That kind of runs hand-in-hand, that gangs generally control the drugs.

Drugs cost money. Money is a very important thing to the inmate population, although they are not permitted to

have currency on their possession. A lot of money transactions happen outside of the fence. But money is a very important thing, and drugs and money have caused death, serious assaults, extortion, very serious things.

So drugs represent a major problem to prison administrators, and, you know, our department has a zero tolerance for drug possession or use in prison, although we do find, you know, narcotics in our institutions at time—from time to time.

Q. What about the guy who has several, several, several, lots of minor misconduct tickets? Do you have that sort of person at OSP, too?

A. No, I don't.

Q. Let's tell the Judge how Ohio State Penitentiary is run.

What is the mission of OSP?

A. Our mission is to safely house the most dangerous inmates in the DRC prison system; to date, 44,400 and some. Of that, 330 or less than one percent are confined at the high maximum level.

So we are charged with the safe housing.

[814] THE COURT: 44,000 refers to the total number in the Department of Rehabilitation?

THE WITNESS: Yes, sir.

A. We are charged with the safe housing.



I need to protect the citizens of Ohio, which means nobody can escape.

I need to protect the inmates from one another as well as ensure that the staff and visitors have a safe place to work and visit.

We do this through a tight security program that's coupled with programming and socialization opportunities which are a vital component, in my opinion, to prison security.

Q. How does programming and those other benefits fit into the mission of OSP?

A. I'll try to break down and summarize.

Security procedures are essentially accomplished through controlling inmate movement. Our movement is limited. When it is, it's closely supervised. Inmates are, in most cases, restrained in some fashion.

As a part of that, we offer a wide diverse range of programming and socialization opportunities. I think we've—we've seen examples of program completion yesterday. We have a video department that offers programming opportunities 24 hours a day, 7 days a week.

* * *

[825] generous.

Q. How about legal services?

A. All inmates in DRC have access to legal services and the Courts.

Ours is a little bit unique. I have two paralegals who are full-time employees. Our—generally facilities have law libraries that are just a room full of several volumes of law books. I have a few volumes of law books at OSP and everything else is on a CD, CD rom sets that we purchase and update every year. So ours is a little bit unique.

The inmates, if they are in need of legal services, write a correspondence to the paralegals, make a request, and then the request is delivered to their cell.

Q. How does the programming at OSP compare with segregation units of which you are aware?

A. Programming in segregation units that I'm aware of is very, very limited.

I think that we are heads and shoulders above the segregation units as far as our programming, offerings and opportunities.

Q. How about telephone and visitation use, compared to that?

A. Visiting is afforded to, based on my experience, all inmates that are housed in segregation units across the state, [826] although they are maybe not quite as prevalent as the opportunities that are available at OSP.

Telephone in segregation units, again based on my experience, is limited to emergency calls; for example, in the case of a death of a family member, and attorney and clergy telephone calls.



At OSP we offer all three of those categories as well as regularly scheduled phone calls for the inmate population.

Q. OSP is pretty new and it's air conditioned, isn't it?

A. Yes, the—the entire area, with the exception of the fresh air spaces that are used for recreation activities, is heated and cooled. We maintain the same temperature virtually all year round.

Q. Do those segregation units have some common themes with OSP as well, though, for instance, in the way that inmates are celled?

A. Yes. Some do, some don't. Depending on custody level, celling is either double celling or single celling.

Other common themes that I can think of is, you know, opportunity for shower, opportunity for both indoor and outdoor recreation, controlled movement.

In segregation areas, restraints are always used based on my experience.

Q. Where do they eat generally?

[827] A. In their cells.

Q. How do they communicate with other inmates?

A. Generally through standing at the cell door and yelling or talking out the—out the door cracks to other inmates.

Q. Can they see each other when they talk?

A. Depending on the design. In most cases—in some cases yes, in some cases no.

At OSP, depending on your cell location, you can generally see at least one other—one other cell.

There are segregation areas in the state where you can't see other cells because they are just—there's a long line. So that, that varies a little bit across the state.

Q. Does the size of the pods also make a difference in inmate communication?

A. Yeah, I think it does.

Some of the segregation areas in the state that I've visited are large, which makes communication a little bit more difficult because it's loud, you may have to yell a long distance.

The pods at OSP are small. They run with 15 or 16 cells, so I think the communication opportunities are a little better than some of the segregation areas because of the smaller setting.

[828] Q. What segregation units are you talking about in your experience that you've seen and you are familiar with?

A. Well, I've seen almost—almost all that I've—most of the ones in the state.

I'm very familiar with the ones that I've worked at. I've worked at Lorain, Trumbull and Mansfield Correctional



Institutions so I'm very familiar with those because I worked there for a number of years.

Q. Have you seen them at SOCF and Lucasville?

A. Yes, I have.

Q. You said that you were at Mansfield.

How does OSP compare with segregation for death row inmates?

A. Segregation for death row inmates is handled in the area called DR 5. DR 5 is a very, very secure area. It's 20 cells. The inmates are assigned to an individual cell.

They are moved individually under very heavy restraint.

The escort numbers as far as staff are similar to OSP.

The doors are the same. We have a solid door as opposed to bars. Manci in the death row segregation as well as death row general population and the segregation area that's used for the general population has solid doors.

Q. Now, that's the segregation part of death row, right?

[829] A. DR 5, yes.

Q. We heard some testimony that inmates may want to go back to death row as opposed to stay at OSP.

What are the differences that bring that up?

A. I think the quality of life that's available to an inmate is better at OSP.

DR 5, when I was there, didn't have the televisions in the cells, we didn't have near the programming opportunities. Commissary offering was much lower.

Q. Can you be on death row but have a security classification that's actually lower than what gets you the kind of conditions at OSP?

A. No. The death row inmates in Ohio are assigned as maximum security inmates and not eligible to decrease below that.

Q. Okay. Do you have inmates that want to stay at OSP when you tell them they could transfer?

A. Yes, there are some.

Q. Why do they say that?

Why do they do that?

MR. GILBERT: Objection.

THE COURT: Sustained.

MR. LANDES: 801(d) admissions of party opponent, Your Honor. This is a class action. If they [830] told him they want to stay, that's what it is.

THE COURT: If he repeats a specific statement, but he can't testify as to generally.

MR. LANDES: Very good, Your Honor.



THE COURT: Just—

BY MR. LANDES:

Q. Can you tell the Court what inmates have told you who have said that they wanted to stay at OSP?

MR. GILBERT: Same objection, Judge.

THE COURT: Wouldn't it be an 801 admission?

MR. GILBERT: I think he needs to identify more particularly who the individual inmate was that he had a conversation with.

THE COURT: Why don't you lay that foundation?

A. You are going to have to give me a minute to—

Q. Sure.

A. I can recall statements. To be able to attach the statement to a specific inmate is going to be tough.

Q. I guess I mean at OSP since you have been working.

A. Yes.

Q. Is that—

A. Yes, I've had conversations with more than one.

MR. LANDES: Your Honor, I would argue that that necessarily is a class member and, therefore, would be [831] an 801 admission.

THE COURT: It is if he can remember a specific statement and not just a generalization.

THE WITNESS: I can recall two statements that I can quote.

THE COURT: Go ahead.

A. I can quote, "Because I'm safe."

The other I can quote is "Because it's not too bad here."

Q. Are you familiar with other supermaxes, as they are called, in other states?

A. Yes.

Q. And how does OSP compare to that, what you've seen?

MR. GILBERT: Object to that as well, Judge.

THE COURT: There's this dispute as to what the comparison is.

I'll allow it. It may not be relevant if the comparison is not other supermax prisons.

So I'll allow it, but it may not be relevant if the comparison is with other people in AC.



But go ahead.

A. Could you ask me the question one more time, please?

Q. Sure. Compared to other supermaxes in other states, how does OSP compare, let's say as to programming?

A. As to programming, I think we are at this time [832] offering—I can think of three that I've visited.

One that claims to be a supermax, their program offering is as extensive, possibly greater, although I would argue that their definition of supermax is very different from Ohio's definition of high maximum.

So I guess what I'm saying is they call themself a supermax, but I think it's comparing an apple to an orange.

Q. Okay.

A. The second unit that I visited is similar I think.

MR. GILBERT: Judge, objection, only to qualify which institution he's talking about.

THE COURT: Can you tell us which one, which ones?

THE WITNESS: Sure.

A. The first one I was referring to is Oakpark Heights in Minnesota.

The second one that I'm talking about now is Colorado State Penitentiary, and even CSP is a little bit

different because their Department of Corrections does not operate a maximum security facility.

Inmates go from close to administrative segregation or their supermax-type of a unit.

That facility has a—offers a strong programming component, although I think ours is stronger [833] with the addition of the program booth opportunities that we offer.

Q. They don't have that there?

A. No, they don't, at least not when I visited, they did not.

The other I've been—the other that I'll compare to is the Bureau of Prisons ADX facility, and I think that based on what I saw when I was there, we were offering a great deal more programming opportunities than that facility does.

Q. How about outdoor recreation? How does it compare?

A. Outdoor recreation as—do you want me just to compare to the three facilities that I have been talking about?

Q. Please.

THE COURT: Okay.

A. Minnesota offers an outdoor recreation area that is more open than ours at OSP.

It's a chain link-type setup that's outside of the building.



CSP offers identical conditions to the Ohio State Penitentiary.

And the Bureau of Prisons offer—it's—it has an open top. It's three walls with an open top.

Q. Okay. How does OSP compare with the use of force and [834] assaults in the institution?

A. I think our numbers are very low as compared to high security prisons in Ohio, as well as high security prisons across the country.

Our use of force rates are minimal.

We've experienced a great reduction in those since we opened. When I was the major, there were—the incidents were more frequent.

And we are down now to the level where we are—we are at less than five per month. And even those are, in most cases, not very intense or serious use of force incidents.

Q. Can you say generally that otherwise the conditions are more or less the same at the other supermaxes that you are familiar with?

MR. GILBERT: Objection.

THE COURT: What grounds?

MR. GILBERT: Leading.

THE COURT: Sustained.

Q. What did you say about other similar conditions that you found at supermaxes of which you are familiar?

A. Supermax-type operations generally are very similar across the country.

There, you know, there's different words, terms. If you look at it as the big picture, generally [835] they are very similar.

There is a range, though, from supermaxes that operate very, very restrictive with hardly any privilege up the spectrum to, you know, institutions like OSP that are offering programs, that are offering congregate activity opportunities, et cetera.

Q. I would like you to take a look at Defense Exhibit C in your book, Page 11.

That's part of the new regulation on classification.

We have been talking about what your experience has been to date.

This regulation actually gets into sort of codifying differences between privilege levels of different classifications, doesn't it?

Are you there?

A. Yes.

Q. Okay. What's the scoop? This lays out privilege levels of different classifications for the policy that's been passed and will go into effect March 1st?



A. Yes.

Q. Can you just take a look at that and let the Court know what conditions at OSP are better than elsewhere as it relates to phone calls, let's say?

I'm asking you to compare OSP with other [836] locations in Ohio as opposed to some other comparison.

A. Other segregation locations?

Q. Yes, that would be fair.

A. Based on my experience, it's better. You know, as I stated before, the segregation units typically do not allow nonattorney, emergency or clergy telephone calls.

Q. And you would have both Level 5-B and 5-A housed at Ohio State Penitentiary?

A. Yes.

Q. How about recreation?

A. Recreation, based on my knowledge of the seg units in Ohio, the five one-hour opportunities per week is followed, that's an ACA standard, and all our units are accredited and, therefore, comply with the five-hour period.

I think the difference comes under the 5-A category, where the inmates would have congregate opportunity with at least one other inmate.

Q. That would not be true in segregation units that you are aware of?

A. In some. Some are double celled, and in a lot of those cases the practice is that both cellmates go to recreation together.

Generally in the units that do not have double celling, the recreation opportunities are individual.

[837] Q. Okay. How about showers, how does that compare with your experience? Not how many showers you take, but rather segregation units.

A. The facilities that I've worked at, Manci—well, we had both at Manci.

A lot of the seg units in the newer facilities have showers in the cell.

The theme behind that is although it's expensive for construction, the theme behind that is security. It's one less movement that correctional staff have to make.

So there are some that have showers in their cells which offers the inmates unlimited access to the shower.

The other facilities that do not have the shower in the cell, I think generally now are providing five. I think we are consistent with that. I think the minimum that I'm aware of is the requirement is three.

So we are exceeding the requirement, but we are fairly consistent in that area.

Q. How about television?

A. Television, as I testified before based on my experience, is nonexistent in other Ohio segregation units.



The exception that I'm aware of is the segregation areas at SOCF. They do have—do have [838] televisions mounted on the wall. But by and large, OSP and SOCF are the exceptions that I'm aware of.

OSP's obviously a little bit more available because the inmates have a TV in their cell and can watch whatever channel they want. At the SOCF, you have to watch what's being played.

Q. How about visitation? How does that compare?

A. I think it's fairly consistent.

Q. I think this actually goes over to the next page, the visitation.

How about programming, how does that compare—

A. I think—

Q. —as it's going to be here in the regulation?

A. I think, you know, as I've stated before, the programming opportunities that OSP offer—offers is unmatched by any other location in Ohio that I'm aware of as it pertains to segregation areas.

Q. Thank you.

We have been talking about outdoor recreation. I wanted to draw your attention to Exhibit N as in November, Defense Exhibit N.

What are we looking at, Warden?

A. This is a copy of a computer-made projection of what the new outdoor recreation areas are going to look like at [839] OSP once completed.

Q. What are we—are we seeing the ceiling there, the—is that what's on top here?

A. Yes, it's a—it's going to be constructed out of—the name is escaping me. It's a mesh, a wire-type mesh ceiling that's going to allow the elements, the snow, the rain, the sun, the cold, the hot—it's going to be as open as possible ceiling surrounded by walls on all the sides.

Q. Is the top view day and the bottom view night?

A. Yes, it is.

Q. Why are you adding that?

A. It just—it goes along with, I think, the—my philosophy on things that we need to do at OSP.

I think that, you know, in addition to the other changes that I've initiated or are in the process of initiating, I approached central office and we had discussions about outdoor exercise opportunities.

We went to the extent of researching with other jurisdictions across the country. I think it's just—it's something that's going to improve the quality of outdoor exercise opportunities for the inmates housed at OSP. We are doing it because we think it's a good correctional decision on our part.



Q. I'd like you to look at Exhibit L, and while I'm [840] doing that—L as in Lima—what is the American Corrections Association?

A. The American Correctional Association is an organization or body that has developed standards for correctional agencies; not only prisons. They have standards for jails, boot camps, penal industries, headquarters or central office.

They have a set of standards that they require if you would like to be accredited by the organization, that you are required to comply with.

Q. Has—and is Exhibit L the report for the first review of the facility?

A. Yes.

Q. And the one behind it, M as in Mike, is that the second review of the facility?

A. Yes, it is.

Q. Did OSP pass?

A. Yes, on both occasions.

Q. Do they get percentages for that?

A. Yes. But ACA requires compliance with a hundred percent of the mandatory standards. Their mandatory standards are generally attached to life safety-type issues.

An institution must comply with a hundred percent of those during the audit.

[841] The remaining standards, which number I think close to 300, institutions must—must comply with at a minimum of 90% of those standards.

Our scores during the first audit were a hundred percent compliance with the mandatory standards, and 99.5, I believe it was, on the nonmandatory standards.

During our second audit, we complied with a hundred percent of the mandatory standards, and 98.7% of the nonmandatory standards.

So in both cases we were awarded accreditation or in the second case reaccreditation by ACA.

Q. In the most recent review, did they bring up or did they fail you for outdoor recreation?

A. Yes, they did.

The requirement as it stood in 2001 required a certain height of the ceiling area of the outdoor exercise.

Due to the construction of OSP, our ceiling height is not what ACA requires it to be. That standard in this year changes, and it eliminates that requirement for height.

Q. Was there any other aspect of the outdoor recreation that the ACA failed you on, other than ceiling height?

A. No.



Q. And what is the change that's going to occur [842] concerning ceiling height with the ACA?

A. As I recall, the height was required to be 18 feet from the floor to the ceiling, and OSP does not have 18 feet.

Q. And is that—is that requirement going away?

A. Yes, it is.

Q. I shouldn't call it a requirement, should I?

A. Well, it's—it's just—it's part of the standard.

Q. Okay. But it's nonmandatory?

A. It's nonmandatory.

The other thing I think it's necessary to add is the fact that once our new outdoor exercise areas are complete, they will be in full compliance with standards set forth by ACA.

And the blueprints are completed and are in compliance, so.

Q. I'd like to show you one page of Exhibit M, Page 39.

Take a look at that, please.

A. Okay.

Q. Is this a summary that the ACA compiled of what's called significant incidents?

A. Yes.

Q. And what does that mean?

A. ACA requires reporting on all significant incidents during their three-year accreditation process, so I'm [843] required to report to them things that fall under these categories.

Q. What does that show for the number of assaults, inmate-on-inmate?

A. Zero.

Q. How about number of escapes?

A. Zero.

Q. How about number of assaults by an inmate on staff using weapons?

A. Zero.

Q. How does that compare with other institutions, especially considering the kind of folks that you're asked to take care of?

A. I—I think it's—it's a—it's a comparison that I'm proud of.

I think that there are institutions in both the Ohio system as well as across the country would be hard-pressed to match these kind of numbers. It's just—it's an attribute to how safe the facility is operating.

MR. GILBERT: Judge, we enter an objection, move to strike.



I don't think it's relevant to this lawsuit, how secure the institution is.

THE COURT: Inmate against inmate goes to

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[847] A. Yes.

Q. And then if we look down at the bottom of the document under recreation and showers, it says "Seven one-hour recreation periods per week and five-minute showers seven days a week"?

A. Yes, it does.

Q. Now, under the new classification system that will become effective in March, 2001, isn't it true, Mr. Ishee, that prisoners on Level 5-A corresponding to the old Level 3 will have only two 10-minute phone calls per month?

A. Yes.

Q. And isn't it true that rather than recreation seven times a week as on the present Level 3, they will have recreation five times a week?

A. That's true.

Q. Now, with regard to the mission of the Ohio State Penitentiary, Mr. Ishee, I wonder if you would agree with the following statement:

"As inmates confined at OSP demonstrate increasingly responsible behavior, they move through a level

system. And with the exception of a few inmates, are transferred to facilities with lesser levels of security."

A. Yes. I agree with that.

Q. In fact, you wrote it, didn't you?

A. Yes, I did.

[848] Q. And affirmed it under oath.

My question is how do you decide who those few inmates are who will not move through the level system and will not be transferred to facilities with lesser levels of security?

A. That's a classification decision that's—that's, you know, made at the appropriate time considering all of the information that's available to me or others who partake in the classification process.

Q. Now, when you say that there are a few inmates who will not move through the level system and will not be transferred to facilities with lesser levels of security, you are talking about prisoners who will be there the rest of their lives, are you not?

A. I think it's more fair to say prisoners who will be housed at OSP for a long time.

Q. Something like—and if this does not seem right to you, just tell me—something like what Mr. Ryznar had in mind when he said that beginning on March 4th, an OSP committee will meet with incoming prisoners and tell them if they can't expect to get out in three years?



A. Yes. When this new policy takes effect, we will provide the inmates with a notification as required by the new policy.

Q. And if you are going to know that information on [849] March 1st, I assume you know it now for the prisoners who are presently at OSP?

A. I think it's—I think it's fair to say that I do know of some of the inmates in population that because their history is so very serious and dangerous, that, yes, they will be and continue to be housed at OSP for a long time.

Q. Is there a list of such prisoners, Mr. Ishee?

A. No, there isn't.

Q. Is there a list in your head?

A. I think that—I think that there are some that, yes, I do know that are going to be housed at OSP for a very long time.

But I think it's also important for us to, you know, reevaluate every inmate every year as they come up for classification, and make the decision at that time.

Q. So that even if you had told someone they should not expect to get out until after three years, you would nevertheless interview them in each of the intervening years?

A. Yes, we will, because there's nothing that would preclude our initial decision from changing.

You know, I think there's factors that, although I or one of my staff may tell an inmate when they get there on—

during their initial hearing that, yes, you [850] fall into this category of expecting to be at OSP for a period of three years or greater, there exists the chance that we may, through, you know, housing, watching, monitoring the inmate, change our decision and elect to release them sooner.

Q. Well, let me ask you, Mr. Ishee, about some particular prisoners.

Are you familiar with a prisoner named Gerard Valdes?

A. Yes. What's his number?

Q. His number is 182559?

A. And he's currently at OSP?

Q. Apparently.

A. Yeah, I just wanted to assure that's the same person.

But yes, I am familiar with him.

Q. And is he the same person who in April, 1996 stabbed an inmate 17 times over marijuana?

A. I'd have—I need to review his record to give you a hundred percent certainty.

But, yes, I do recall that he was involved in a stabbing incident.

Q. Here is the high max security classification review form for Mr. Valdes from the year 2001.



And with this before you, would you say I'm correct in suggesting that he had apparently, in April,

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[858] Q. Stojets still at OSP, Bishop transferred out on an interstate transfer?

A. I can testify that I transferred Bishop to another Ohio prison.

What happened with him after that, I'm not totally aware of.

Q. Which other Ohio prison did you transfer him to?

A. Correctional Reception Center.

Q. I'm conflicted, Mr. Ishee, as to whether to ask you to call the names of that list of persons in your head who are going to be there a long time, and I think I've decided not to because I realize that's a very grave thing in this kind of setting, to put that kind of information on the table.

But let me ask you to take a moment, if you would, and in your own mind reflect and tell me how many persons in your opinion fit that description to whom I assume you will be giving that information on the 1st of March; that is, persons already at the institution.

A. I—you know, without reviewing records which certainly will happen before placements, official placements into 5-B and 5-A, I'm going to give you a ballpark.

And I think that as it stands now, that number would be probably less than 15.

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**TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE JAMES S. GWIN, JUDGE OF SAID COURT, ON THURSDAY, JANUARY 10TH, 2002.**

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**VOLUME 4**

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**Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.**

## DIRECT EXAMINATION OF CHASE RIVELAND

[866] Q. What do you do this evening?

A. I'm scheduled tentatively to teach a class this evening, but that remains on travel conditions.

MR. LANDES: In the interest of time and efficiency, Your Honor, the plaintiffs have agreed to allow me to put a set of the written qualifications in the record and just hit the high points—

THE COURT: That's fine.

MR. LANDES: —in the oral testimony, which we will do now.

BY MR. LANDES:

Q. I wanted to return, take your attention to your time in Wisconsin.

Did you have involvement with a facility to take care of the most high maximum or most secure-required inmates in Wisconsin?

A. I did. At one point in time during my tenure in Wisconsin, I was appointed as the superintendent of what is named the Portage Correctional Institution which at the time was the highest security facility in that state.

Q. Did you actually run it, too, did you say?

A. I actually designed, built and briefly ran that institution.



Q. Did you ever run any State's prison system?

A. I have.

[867] I was the executive director of the Colorado State correctional system from 1983 through 1986, and the Washington, the Washington State correctional system from 1986 until January of 1997.

MR. LANDES: Your Honor, is there a trick with the microphone so that he can sit up and be comfortable but still—

THE WITNESS: I'll just attempt to speak a bit louder. That may help.

THE COURT: I think we can hear him.

MR. LANDES: Thank you, Your Honor.

Q. In Washington, did they have facilities for the most high secure inmates?

A. There are. There were and there are.

Q. Can you describe those?

A. In Washington, we created what, by name, units called intensive management units that were 90 to 110-bed units attached to larger institutions.

Basically, you know, operational terms, look exactly like a supermax institution or the supermax institution represented by the Ohio State Penitentiary.

Q. Have you been an expert witness in cases dealing with those kinds of institutions?

A. I have.

Q. Where?

[868] A. I was involved in the Ruiz case in Texas and the Osterback case in Florida.

Q. Have you also been an expert witness concerning the classification of inmates for security?

A. I have.

Q. Were you picked by the National Institute of Corrections to write about high security facilities?

A. I was.

Q. What did you write? What did you study?

A. In effect, I was asked to write a monograph about supermax prisons. The request was made early in 1997, it was published early in 1998.

Its intent was the National Institute of Corrections had an interest in the proliferation, if you will, or the increasing numbers of supermax-type institutions and settings around the country, and wanted a monograph that would describe the things that people should look at if they were either considering building such facilities or considering operating such facilities or, indeed, were already operating such facilities.



Q. Is there anything else out there that is like that monograph that you have written?

A. There have been some articles written by a variety of individuals on specific type things. I have not seen a generic-type document since that time.

[869] Q. What do you call the type of facility that we have been calling supermax?

A. As I surveyed facilities in jurisdictions around the country and looked physically at many of the similar-type operations around the country, I found that the—that the verbiage used to describe them differed across jurisdictions, so my only sort of universal verbiage was to call any facility or any program that operated and managed inmates on a 24-hour-a-day, 7-day-a-week basis for extended periods of time would be, in effect, an extended control facility.

Q. What is the genesis of that type of facility?

Is this a revolutionary concept or does it come from something else?

A. Actually, as I traced it back, you could find its birthplace probably would be Alcatraz, run, operated by the Federal Bureau of Prisons many years ago, to which they sent either notorious or terribly visible or terribly assaultive federal inmates.

That evolved into the Federal Bureau of Prisons opening a facility called Marion in Illinois that they operated as a—as what I would call an extended control facility for a period of time until they replaced it with a facility in Florence, Colorado entitled the Administrative Maximum Prison.

[870] It seemed that about the time of Marion, that a number of jurisdictions around the country began planning similar kinds of facilities or programs for their jurisdictions.

Q. So that the feds were first?

A. That's my analysis, yes.

Now, having said that, many jurisdictions of course have had a variety types of disciplinary segregation, administrative segregation, protective custody over many years, but typically operated with different types of intent.

Q. Had the intent at one time been disbursal of these kinds of inmates?

A. It was. For many years I think we in corrections used disbursal as our means of mitigating problem inmates in the system.

You would move them to different places, either within the jurisdiction or between jurisdictions if you will, or we would keep people moving for a period of time so that they didn't become a serious problem in a given institution.

Q. On—in the contrary, what is the concept behind what you called extended control facilities?

A. I think the reverse of that, of course, is concentration. That you take the individuals that you feel [871] are the greatest threat to the system and you concentrate them in singular places, believing that you can mitigate the problems that exist in other institutions.

Q. In your studies, has that been effective?



A. I believe it is.

I don't know of any defining research that says that that's effective, but I think that there—there was a great deal of anecdotal information in many jurisdictions that would suggest that it is.

Q. All right. How many of these types of facilities have you seen yourself?

A. If we used my definition of extended control facilities, I've been in probably in about 20 to 25.

Q. Does that include Ohio State Penitentiary?

A. It does.

Q. And have you formed opinions about Ohio State Penitentiary?

A. I have.

Q. First, would you explain to the Court what you did to examine Ohio State Penitentiary?

A. I made an initial visit at the end of August, a three-day on-site visit to the penitentiary.

Prior to that, I had asked for and received, I might add, voluminous amount of information including policies, procedures of not only OSP but of the DRC, [872] literally a couple of boxes full of documents that I reviewed prior to an on-site visit, some of which were subject matter that I had specifically requested, and some of which—some of which

were the kinds of information that the department and OSP themselves thought might be helpful.

During my first visit to OSP, I interviewed staff at all levels, inmates both in their cell and individually being pulled out to interview booths for some interviews; I observed almost all activities that you would anticipate would occur in such a facility, including feeding times, medical visits, the use of the library process, legal access; toured the entire facility inside and out, I might add, because of proposed plans; and then reviewed a variety of records and other policies and procedures that were on site.

Q. And I wanted to let you know, please refer to your report or notes, if you need to, to refresh your memory.

A. Thank you.

Q. Did you interview—do you know about how many inmates you interviewed? And I don't necessarily mean at that visit.

A. Individually I interviewed probably about 20 inmates. Other than cell-side, I talked to a wide range of inmates in cell front.

[873] Q. I see. In addition to the 20?

A. In addition to the 20. And I might add that this included a second visit in November.

Q. November of 2001?

A. That is correct.



Q. Okay. Did you interview some inmates who were chosen by the plaintiffs?

A. I did.

Q. And why did you do interviews of inmates?

A. Basically I just wanted to get a general reflection of how inmates that were in that particular facility were responding and what they saw either as problems for them individually, or what they saw as the experience compared to other experiences they may have had in the correctional system, to either verify or refute items that I had seen either in their initial complaint, to look at the issues that I thought are germane to the operation of an extended control facility, and to compare that with what I could observe or read about.

Q. Did you listen to the inmates to try to figure out whether there was some other item that you should put on your agenda for inspection?

A. I do. Typically if I feel that it raises an issue, the conversation with an inmate raises an issue that I haven't looked at or hadn't planned to look at, then I will

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[878] it to other states' prisons?

A. I did.

Q. Why?

A. Really for two reasons.

One, I think by having the ability to compare a singular facility's operation to other jurisdictions, one can compare it to generally acceptable correctional practice or standards.

A second is that that's a base of experience that I have, both in my operation of—in three jurisdictions, but also a fairly intensive look at similar kinds of facilities in several other jurisdictions that I have visited.

And I think thirdly, because the jurisdictions frequently will transfer inmates between jurisdictions through the interstate transfer process, and it's not unlikely that an inmate at OSP might end up at a similar kind of or similar custody facility, at least, in another jurisdiction, and the reverse could be true also.

Q. So an inmate might reasonably expect to be in another state's prison system?

A. It is not at all uncommon, particularly with high custody or high security inmates.

Q. Before we go into—you looked at various areas and subdivided the operation and conditions that are in various [879] areas.

Before we go into that, would you let the Judge know how you felt Ohio State Penitentiary stacked up with the other places in your experience?

MR. LOBEL: Objection. "Other places" is quite vague. Could you make the question—

THE COURT: Okay.



MR. LANDES: Other institutions.

THE COURT: Why don't you rephrase?

MR. LOBEL: Other supermax institutions?

What's the question?

Q. Other prisons that you compared it to.

A. If I would be allowed to rely on my definition of extended control facility—a

Q. Yes.

A. —because again such facilities range from the 90-bed facility that I, indeed, operated in the State of Washington to 2,000-bed facilities operated under similar conditions in Florida and Texas, and a couple thousand-bed facility, the notorious Pelican Bay in California, but the basic operation of those facilities under my definition would remain the same.

I was quite surprised, quite honestly. I have activated new institutions in my career in all three states, and activating new institutions such as this that's [880] simply a little over three years old—I believe opening in May of 1999—'98—'99, the first inmate—and operating a new institution that is—where there's not a lot of history, either within the jurisdiction in operating a supermax facility, or even arguably around the country in operating supermax facilities, I was pleasantly surprised, quite honestly, at the amount of programming that was available at OSP, the level of sophistication that I felt the staff displayed in terms of restraint, the absence of heavy use of force that I find in a lot

of extended control facilities, the absence of heavy use of chemical use of force that I find in many such facilities.

The—I was completely astounded and can only compare it to one other similar facility, the fact that all inmates, except those on the initial orientation, are allowed televisions. This is not common in anywhere in the country, with one exception possibly being the Administrative Maximum facility run by the Federal Bureau of Prisons; and the amount of programming available, and that, of course, translated to me as stimulation of the human mind, which is devoid in many such facilities.

So my initial impression was a very favorable one in terms not only of what was already there, but the progress I felt the facility and the department had made during a fairly brief period of time, of the activation of [881] that facility.

Q. You mentioned classification.

What did you find concerning the classification system for high maximum as practiced by Ohio State Penitentiary?

A. I thought that they were very thoughtful.

As I wrote the monograph on supermax, there were a couple criteria that I felt were terribly important for any jurisdiction that were using high custody facilities.

First of all, it's important that a criteria be established that represent the characteristics of the individual to be sent to a high custody facility. I might add, there are other specialized facilities where the same thing should be true; psychiatric facility, an alcohol/drug treatment facility.



But that it should be explicit so that people understand that not simply anyone should be transferred to such facility.

And I found that in the policy.

It then should have a rigorous review, both from the referral and who subsequently becomes involved in the decision for movement and approval for movement and placement in such a facility. I found that to be a very rigorous policy also, going from the referring warden to [882] the central office and a subsequent review back at OSP again. That was a step that frequently isn't done in almost any jurisdiction.

And I think that the adherence to that policy then becomes important. Is the policy actually being followed? And I would look at case files in order to determine if I felt that that, indeed, happened and, of course, the review of the 444 profile cases to see if, indeed, I felt that it happened.

Q. How did you go about testing whether or not the policy was being followed and whether your view of generally accepted correction practice was being followed?

How did you do that with the materials you had?

A. Well, in the instance of the 444 profiles, I actually charted them out and made my own little chart, if you will, on the criteria that were reflected in those particular profiles and did they meet the criteria that were in the policy.

Secondly, I did sort of random reviews of some cases both on the case managers as well as those pulled from the units to see if, indeed, the criteria were established in the inmate file.

Q. Just for purposes of refreshing your memory or to finding the past recollection recorded, on Page 9 of your [883] report you do set out some numbers of your examination of the 444 profiles that you looked at.

Does that assist you in letting the Judge know the results of your study?

A. It does.

Of the 444, I found that 283 of the inmates that were profiled had assaulted one or more other inmates. That 23 of those assaults on inmates had resulted in a death of an inmate. That 209 of the inmates had assaulted one or more staff. That eight of those assaults resulted in the death of a staff member. That 155 of those inmates had assaulted one or more inmates or one or more staff.

Fifty-seven of them had one or more escapes or escape attempts from major institutions. One hundred twenty-eight of those inmates had significant involvement in a major disturbance or a riot, and in most instances were leaders of the incidents.

And 42 of the inmates had records of possession of one or more deadly weapons.

I did not include in my chart documented instances of people—of actions that typically could be considered assaults such as throwing of body fluids, blood, urine and other body fluids at staff.

Typically those would be considered assaults. I did not count those in these particular figures.



[884] Q. Okay. Did you also look at the rates at which people came and left the institution to determine whether or not the classification policy was too broad or too narrow for this kind of institution?

A. I did.

Q. What did you find there?

A. The most recent figures that I had show that up to the time of opening in May of 1998 to December 31st of 2001, that 661 inmates have been received at OSP. That there were a few over 330 released during that period of time.

That in 2001 alone, there were roughly 121 that were sent out and roughly 100 received.

Q. If I told you that numbers have been run from the beginning of the institution to the end of 2001, and 661 had been accessed or brought into the institution, and about 324 had gone out of the institution, what does that tell you about the use of the classification policy?

A. I think that shows that they are being quite effective in the application of that policy, and the policy as read it, the initial policy, is one that is trying to preclude the unnecessary placement of people in a place such as OSP, in an environment such as OSP, and that obviously two things are occurring given those particular numbers: First of all, the intake, given the size of the [885] Ohio correctional system, is quite small. Very few in numbers compared to the 140,000 or whatever the number of inmates in the total system are today.

But secondly, that the movement is not one that is allowing people in general to languish. Almost 50% of the

inmates are being moved out in fairly short periods of time, and I use the word "Short" because in most extended control facilities, three years that this institution has been open, is not a long period of time.

Q. The numbers for 2001 were about 41 coming in and 124 leaving.

What does that tell you about trends?

A. Well, it's a trend I guess that I—that is concurrent with or congruent with many other trends I've seen as I looked at the operation of the facility over the years, that people have continually improved the operation of the facility.

And it would suggest to me that a great deal of effort is going into moving people out and not letting people languish.

Q. Did you examine the number of profiles that showed that person was there for gang-related activity?

A. I did, in that same review of the 444, I did so.

Q. Did you find the number significant?

A. The—I actually only found one profile that [886] suggested that the inmate was there for gang activity or STG, Security Threat Group activity in and of itself.

There were other instances of notation that the person was believed to be or admitted to or was a Security Threat Group member, but in each of the other instances there was another causative criteria that was met, an assault of a staff member or some instances murder or repetitive escapes



from—attempts from major institutions, similar kinds of behaviors.

I simply found one of the 444 that appeared was there for Security Threat Group involvement only.

Q. How does that compare to your experience with other similar extended control facilities on their use of that criteria?

A. It's somewhat astonishing. I could mention, for example, in the State of Texas, if you are perceived to be a Security Threat Group member in Texas, you go into conditions like this automatically, whether you have other compelling behavioral problems or not.

And I might add that over 7% of the Texas inmate population is in conditions like this at the time that I was involved in the Texas system.

Q. Could you tell me something about Hispanic names in San Antonio?

A. I did. At the time that I was touring the Texas [887] system, that was in 1997, 1998, if you had a Hispanic surname and came from San Antonio, you were placed in conditions like OSP. The terminology in Texas was administrative segregation, and there were many institutions operated under that condition.

But that was as simplistic as their criteria was at that point in time.

Q. We have been talking, I suppose, both about the transfer-in process and also the process of review for retention at OSP.

If we could focus a bit on the process for review for retention at OSP, what did you find about that or what can you conclude about that from what you looked at?

A. Well, in fact, again the time frame from when I first reviewed records of OSP and visited OSP, which would have been the review of records in early August of 19—of 2001, the first visit in late August of 2001 and a subsequent visit in November of 2001, was a work-in-progress.

I felt that the review process that was in place initially equaled or exceeded those of the review processes of other similar extended control facilities, and that the review process was, indeed, being done. I observed such hearings as were being held.

[888] The new—their new classification process that sets out review processes that will be effective March 1st even goes beyond the initial process that I both read about and observed.

Q. What did you think of the criteria for transfer and retention that you found in the new policy?

A. I felt that the—that a serious attempt was made to, in the new policy, to enhance the ability to move people out, was one particular piece of it.

The other part, I think, is that it enhanced greatly the privileges available to inmates in the system and allowed them to access those privileges much quicker.

Q. Does the policy still provide for professional judgment in those decisions?



A. It does.

Q. Why is that?

A. It's my experience that in any process that is related to classification in a correctional system, that it is essential that professional judgment be allowed as an override.

I know of no classification system in the country that does not allow for professional judgment to prevail. In fact, I believe in my monograph I talk about that a bit.

There should be, however, safeguards to that [889] process so it's not an individual simply making a professional judgment in and of themself, but that the process itself allows for review; and if a reversal of a recommendation is made, that that reversal is made at the highest levels of an organization.

I find that the process that is documented in the policies for the DRC, both the old policy as well as the present one, certainly meet the expectations I would have of such a policy.

Is this cutting out? It seems like it's cutting. Okay.

THE COURT: It's okay.

MR. LANDES: The Judge can hear you.

THE WITNESS: Okay.

MR. LANDES: That's what counts.

Q. Did you see any evidence that you reviewed that would indicate that professional judgment was being abused?

A. I did not. And I did review a variety of records looking to see if there was any indication that that was the case.

There clearly were instances where a local recommendation would be overridden at the central office. I find that not to be unusual for any variety of reasons, either different information being available at different points in time, or that a central figure or figures felt [890] for the betterment of the system or the safety of the system that an override should be applied.

I might add to that, in many instances in the jurisdictions I served, I was that final person to make that decision to reverse the local recommendation, and found that I had the need to look at the whole system; not simply the singular institution in which the inmate was being placed.

Q. What can you tell the Judge about some other conditions of inmates once they get classified and get sent there?

I believe you looked at property and recreation, telephone and visitation, and the security member—measures that were placed upon them and programming and such.

Would you please let the Judge know what you found there, both as it relates to accepted correctional practice, and also in comparison with the other institutions as you've defined them?



A. I looked at the—at the property allowed as one of the instances that I think that is important, including clothing, hygiene materials, personal property, access to the commissary.

I found that to, in most instances, quite honestly, far exceed that allowed in similar extended [891] control facilities around the country.

Each jurisdiction has its variations, of course. The commissary amount allowed at OSP far exceeds that not only of most extended control facilities, but probably exceeds that of many general population institutions around the country.

The actual property allowed, whether somebody has access to the commissary or not, the amount of property allowed increases much quicker at OSP than other extended control facilities around the country, going from a Level 1 to a Level 2, to a 3, to a 4.

And I think in that instance, not only is it quite generous, but is a cognizant factor that it is important to actually move people quickly into the lower privilege levels.

I might add that my observation of the more recent policy effective March 1st is that that enhances that once more.

Q. Did you find an inordinate number of people on Level 1? You mentioned Level 1 as a level concerning property.

What did you find concerning the numbers of inmates that were on Level 1, and what did you think of it?

A. Actually, if I recall, without thumbing through my report, there were less than 30 people on inmate—on [892] Level 1 at the time that I first visited the institution.

I was a little bit surprised by that because in most jurisdictions you probably see the break-out be roughly thirds; a third on Level 1 depending on the jurisdiction's names for it, a third on 2, and a third on 3.

It—they are moving the people through quite quickly through the Level 1 phase, and the number that have been there for extended periods of time were extremely small. And that, of course, is quite limited in terms of property, but if you are moving people through quickly, that would be of less concern to me professionally.

Q. What did you find concerning recreation, both in frequency and the facilities?

A. I paid particular attention to that because that, obviously, was a major concern expressed in the original complaint.

And I observed it, I talked to inmates about it, both cell-side and otherwise, as well as was able to observe—to talk about and to look at the plans for future solutions for recreation.

If I compare to other extended control facilities in the country, I would have to say that the existing spaces would be adequate. Certainly the inside [893] recreation is adequate in inclement weather. The external spaces, I guess I would say, would be adequate but not desirable; that I would desire something else.



And I was pleased to see that the plans had already been—were being drawn at the time that I first visited during my second visit in November. I was able to review the architectural drawings for the outside plans. I accompanied the warden on a tour of the outside so I could see what those plans would look like on the ground on the outside of OSP. And obviously when completed, I think will far exceed the outdoor recreational facilities I've seen in extended control facilities around the country, many of which I might add do not have outdoor recreation in the sense that the new ones at OSP will have.

Q. Are there some that have what OSP has now?

A. There are.

Q. What—how does the frequency of recreation compare to accepted correctional practice?

A. It meets certainly any existing correctional standard, and it meets or exceeds, in terms of the frequency allowed at each of the levels, Level 1 through 4.

Q. I know my kids count it as recreation. What about the television?

A. Well, I see the value of the television, although I'm sure it's used in many instances for that, I think the [894] value of the television in this particular setting is primarily two-fold.

One, I think it's a stimulus for the human mind. And I think comparing that to the facilities around the country that have no television whatsoever, and in many instances no radio, and in many instances no Walkman sets, in those instances the stimulation for the individual is terrible.

What I found here was not only is it available to anybody that doesn't abuse the privilege, but a wide variety of programs are available, not only for recreational purpose but for religious, educational and other purposes, mental health purposes.

Q. Could we move to telephone and visitation?

What did you find there?

A. I found that the access both under the old policy and under the new policy are—again, meet or exceed any generally acceptable standard around the country.

I was pleased to see that even prior to my first visit, after concerns were raised about the absence of weekend—I'm sorry, this is just not working.

I can—

THE COURT: I can hear you.

THE WITNESS: It goes off sometimes.

MR. LANDES: Can we ignore it? Can we push [895] it down? Is anybody—are you having trouble?

MR. LOBEL: I can hear.

THE COURT: Just stand back from it a little bit. Point it directly towards your mouth is the best way to get it; not up.

Why don't you lift the neck of it and point it in that direction? That should work better.



THE WITNESS: Okay.

MR. LANDES: Thanks, Your Honor.

A. I was pleased to see that prior to my first arrival, that the—when the issue of weekend visitation became an issue, that it was resolved, and at least two weekends a month are now available for visitation at the supermax portion of OSP.

The frequency of visitation allowed is certainly quite generous.

The other advancement I had seen during that period of time was the implementation of removal of the black box during visiting with the installation of eye hooks in the floor that the inmate can be secured to. It's both, I think, an issue of comfort as well as less intrusive to the visitor. And I was able to see both the fact that those had been installed and to see it actually being used.

Q. Did you observe, I guess related to that, did you [896] observe inmate communication from cell-to-cell?

A. I did.

Q. What did you find there?

A. I found that inmates, you know, on the pods in the living units were communicating with each other through—from cell-to-cell, both verbally as well as I was told in other ways that are common, which can be anything from signalling, limited signalling, to knocking on the wall, to a variety of other techniques that are used for communication.

But, yes, communication does occur on the living units.

Q. I'd like to show you what's been previously marked for identification Defendant's Exhibit MM, which is actually an excerpt from your report previously provided to the plaintiffs.

And I wanted to ask you about your conclusions concerning the use of force as this—as it relates to the security measures that are placed against inmates and their conditions in that respect.

What did you find concerning use of force at Ohio State Penitentiary?

A. There are two things that I was looking at, and one is the use of force and one is the use of chemical products and force issues. And I think that's important.

[897] In many of the newer extended control facilities that I've had the opportunity to visit, we found an expansion of the use of force for a variety of reasons that maybe are not relevant here, but nevertheless occur.

And so I charted out the reported instances of force. And it was quite pleasant to see that the reverse of that trend has happened here.

The '98 numbers of course are smaller because they reflect only from May until December 31st of 1998 and the population was slowly growing during that period of time. And so it's not a fair thing to show this massive increase in '99 as being reflective of heavy use, but I think it's quite



instructive to see the drop from 12.75 average in 1999 to the 5 in 2001 for the eight months.

And that suggests to me that, first of all, people are paying attention to it as an issue, that force is not being abused, and I can suggest that I can point to a number of jurisdictions around the country where your figures would be several times this.

And if you look at their first three years or four years of operation, you will find it be many, many times this and growing.

Q. I show you what's been marked Defendant's Exhibit OOwhich is also an excerpt from your report, and it indicates that it's from Page 17.

[898] What does that analysis entail?

A. That, too, is interesting to me particularly when I saw the drop in the use of force instances. Sometimes jurisdictions will replace that with the use of chemicals, and was, I think, quite pleasing to me to see that that was not a replacement thing that was happening.

That, indeed, the same trend we saw in general use of force is happening also in the use of chemical agents.

THE COURT: What do you mean by "chemical agents"?

THE WITNESS: Chemical agents could be a variety of things, but they can be a—typically a CS-type tear gas that can be applied either individually by an officer or in larger amounts through a gas gun, gas grenades, or a variety of other delivery systems.

THE COURT: Okay.

MR. LOBEL: Your Honor, just—counsel asked him about Exhibit MM.

I don't really want to interrupt his testimony, but we looked—we don't find any Exhibit MM in any of our volumes.

It goes up to GG.

MR. LANDES: Yes, Your Honor. It is actually an excerpt of the entire report, and given the Court's

* * *

[900] population institutions, reflect the use of chemical agents in a crowd of inmates, but that would not be true at OSP.

THE COURT: Okay.

MR. LANDES: Thank you.

BY MR. LANDES:

Q. Sir, I'd like to ask you about how programming at OSP compares with accepted practice.

A. Accepted practice is somewhat difficult to talk about in—from a national perspective because, A, there are no standards for extended control facilities and the practice varies widely.



If I looked at it as a continuum of the jurisdictions where I personally have observed extended control facilities and their programming, OSP provides as much or more as any facility I have seen, including the Federal Bureau of Prisons' facility at this point in time.

They have enhanced that again. It was another one of those things I was pleased to see from the time of my visit in August to my time of visit in November.

The amount of programming available on the television is virtually unlimited. A singular inmate probably can't watch everything that's available now on the controlled channels, on the dedicated channels. But I think—and a great deal of programming was going on cell-side both through the GED people and others, religious and [901] mental health people.

But I think the addition recently of the program booths, the ability to collectively program both in education and mental health and in other types of counseling, is a major enhancement that you find in almost no extended control facilities across the country.

Q. Did you observe congregate programming?

A. I did.

Q. How was that done?

A. In two instances I observed a GED teacher with a couple of inmates in program booths where there were several booths linked together above the living unit, on a cross-over above the living units. And then I sat in briefly with four inmates who were in a counseling session with the case manager.

I also have been asked and received permission to talk with those inmates for a bit, broke up their class for a little bit.

I think it was fairly new. The programming at that time, the congregate programming I think had been going on for a couple of weeks before that visit, and but I think this was the second or third time that those particular inmates had been involved in this kind of session.

Q. How rare is that for this kind of facility to have [902] this kind of congregate programming?

A. I know of only three other facilities in the country that have similar kinds of program booth accessibility that are extended control units.

Q. Are you aware of plans to expand this kind of congregate activity?

A. I am.

Actually that again was a work-in-progress. When I first visited the facility, there were one or two located in the—I guess what was called the barber shop of the housing unit.

And in my subsequent visit they had been placed in all of the cross-overs above the housing units in groups of six, and I was shown the areas that they would be placed in for larger accessibility in groups of eight and possibly up to 16.



Q. Within the continuum of the range of restrictions and sanctions and conditions under which inmates find themselves in your experience, how does OSP fit?

A. I—I was, quite honestly, very pleasantly surprised and part of that I guess is I've seen some of the worst in the country, but I've also seen, I think, what would arguably—people in the profession would arguably say are the best.

OSP is in the top two or three in terms, in [903] my impression, both in terms of limitations on who goes in, the efforts to get them out after relatively brief periods of time, the amount of stimulation available both in the cell and the attempts to improve the delivery of services to the inmate outside of the cell.

Q. How does this place compare to, let's say, Texas or Florida?

A. I could probably best simply describe what conditions would be in those instances.

In Texas, through the top three levels, there would be virtually no property available, other than basic hygiene items. And in Level 1, even basic hygiene items are strictly controlled.

There would be no television, either congregate or individual. There would be no radio through the top three levels.

And for an inmate to work themself through the top three levels in Texas, if they can work through at all, which in most cases doesn't happen, would take somewhere between eight and 10 years or an ending of their sentence.

Many never, if they are identified as a Security Threat Group member, they simply don't get out unless they renounce that membership, which seldom happens.

The access to telephone is almost [904] nonexistent. Legal access was somewhat interesting during my visit in that telephone calls to attorneys were taped, monitored and taped, monitored by staff and taped. And that's just sort of an anecdotal expression of the conditions in Texas.

Florida is not much different. Their terminology is close management, but the conditions are the same as OSP in generality. However, the numbers of people being sent there and the privileges they have are negligible compared to OSP.

Q. Is there—you said similar to OSP in some respects.

Are there certain common themes in extended care facilities, in extended control facilities?

A. Well, the common theme I look at is simply the fact of identification of who goes into such facilities.

The fact that they are, for all practical purposes in—the only time they are unrestrained, in personally unrestrained conditions are when they are in their cell, and that that typically is 23 or more hours a day, 7 days a week for an extended period of time.

Q. Is there an institution in Florence?

A. There is.

Q. What is that?



A. Actually the Federal Bureau of Prisons has a couple of prisons there, but the one related particularly to OSP [905] would be what the Federal Bureau of Prisons calls their Administrative Maximum Facility.

Q. And how does—you told me something about the doors there.

How does OSP compare to Florence?

A. Actually I think my comment was that I think the Ad Max facility run by the Bureau of Prisons is seen as being probably one of the more thoughtful institutions in the world in a variety of ways.

One, they, for a long time, have excluded persons who are on psychotropic medications or seen as seriously mentally ill. This goes back to its opening.

They also allow televisions in most of the rooms, and accessible for programming as well as recreational use.

In most of the doors in the Ad Max, however, are double-doored with a cell front door, a short sallyport or vernacular for space, with another door. And so if one looks at the deprivation factor and the isolation factor, it's more severe than anything that exists at OSP.

Q. Within the range of conditions with which you are familiar, sir, where does OSP fit?

A. I would say that it's—it's, again, I would say it's one—in my impression, it's one of the top one or two at the moment of any of the facilities that I have seen [906] that run extended control programs.

Q. What seems to be the trend for OSP?

A. I think the—I have been—again as I think I mentioned early on, particularly with the activation of a new institution, there are a series of problems that people run into and particularly when the concept of that institution is a new one to a jurisdiction.

I have been very pleasantly surprised not only with the improvements that have been made and enhancements that have been made, I think that the leadership that's shown, both locally at OSP as well as the DRC, show a great deal of administrative concern over assuring that it's run responsibly and consistent with or even better than generally accepted standards.

MR. LANDES: Thank you, Your Honor.

Just a moment, please.

(Pause).

MR. LANDES: That's all we have, Your Honor.

THE COURT: Thank you.

Would the defendant make any cross-examination you wish to make—or the plaintiff make a cross-examination?

MR. LOBEL: Thank you, Your Honor.

* * *



[908] certain types of confinement, particularly if that confinement is atypical of the norm, has frequently been one of the yardsticks Courts have used in evaluating the constitutionality of a program."

Now, when you wrote that, you were—this was in the context of supermax confinement?

A. That extended control, yes.

Q. Extended control.

A. Um-hmm.

Q. Do you consider extended control facilities atypical of the norm?

A. I do not.

I do not in and of itself. I have found in my subsequent travels around the country in a variety of roles that there are some jurisdictions that make extended control experience an atypical one for different reasons in different jurisdictions.

In and of itself, I do not see the super—the extended control, the use of extended control within a jurisdiction as being atypical.

Q. Well—

A. I did it myself in each jurisdiction I was in, I might add.

Q. You did write in this that duration of certain types of confinement may be used as an evaluation of the [909] constitutionality.

And when you talk of duration, what were you referring to, what type of duration?

A. I think that varies depending on cause.

For example, I think that there have been cases over the years where the use of disciplinary segregation, for example, for unseemly lengths of terms for the use of discipline has been found to be unconstitutional.

Now, having said that, I think if—if supermax status or extended control status is used appropriately within—in a correctional jurisdiction, that that length of stay then has to be related to some condition that the inmate has presented that suggests that they are going to be a continuing threat, a continuing threat to that jurisdiction's safety.

Q. An ordinary prisoner in your experience in Washington and other jurisdictions, would an ordinary, typical prisoner be sent to an extended control facility?

A. No.

Q. Isn't this, in your opinion, only for very small percentage of prisoners?

A. In my opinion, yes

Q. This type of extended 23-hour-a-day control?

A. Absolutely.



[910] Q. And, therefore, the typical prisoner might be sent to disciplinary control or some other forms or lesser forms of administrative control, but not to this type of extended control facility?

A. I believe that to be true and appropriate.

Q. Now, in your comparison of outdoor recreation, let's start with your position as executive director in Washington.

Were there any facilities in Washington, prisons in Washington for the long-term incarceration of people that had no outdoor recreation? And what I mean by that is recreation that takes place outside of the building.

A. There were.

Q. There were? What kind?

A. There were, at the time that I was the secretary, which was the accepted title at that time, three intensive management units, two of which were 90 beds, one of which was 110 beds, that were located physically or geographically congruent with three separate major institutions around the state.

Each of them had a recreation area that I think would not meet your description of outdoor. It was a -- it was an area that was attached to the living unit that it's—it was probably two or three times the size of [911] the recreation areas combined in present OSP, but had simply an opening at the top of the roof that allowed fresh air and sunlight in.

Q. When you say an opening, was it a small opening or a—

A. It was an opening that would probably be a foot and a half to two feet.

Q. And—

A. And I might add, that was—there was razor wire inserted in that opening, so it wasn't a clear opening.

Q. And you say that was at the time you were director?

A. That's correct.

Q. Is that true now, also, do you know?

A. It is also true, there are additional ones now. I mention only in terms of numbers.

Q. In terms of the other super—extended control facilities, other supermax prisons, let's take Texas and Florida.

Do they have an area where the prisoners actually went outdoors, where it was outside of the building?

A. Yes. In Texas they are called the dog cages. They are small cages that a person can go out and be locked into individually. No congregate recreation.

In many instances the cages are probably 20 [912] feet long and eight feet wide.

Q. When you talked about Washington before, you mentioned these extended control facilities.



Were there any other prison situations where, as a regular matter, prisoners didn't have outdoor recreation apart from the extended control?

A. Only—only medical units and/or some psychiatric units.

Q. So all of the other prisons in Washington had outdoor recreation except for these few extended control—

A. Of some type, yes.

Q. —facilities?

Now, is it true that most supermax facilities denoted as supermax, or that many supermax facilities have some kind of outdoor recreation of the type you described in Texas or elsewhere?

A. If one includes, you know, the Texas dog cages, yes, my answer would be yes.

Q. So the OSP-type of facility where it's actually inside the building is not the usual practice even in these supermax or extended control facilities?

A. There aren't many that I know of that are designed specifically like that, but there are several that I have visited that would have—would not have the complete outside recreational experience that I see planned at OSP, [913] for example.

Q. Right. There are several, but you visited many?

A. That's right.

Q. So I assume most don't.

Most have some form of outside-the-building creation?

A. That's right.

Q. Even in these extended control facilities.

Now, back to your monograph for a minute.

Well, let me just ask you, once an inmate gets placed at a supermax, in your opinion is it important that they receive periodic reviews?

A. It is.

Q. And how often would you say they should receive those reviews?

A. I think that is related to the rigorousness of the criteria that places inmates there in a jurisdiction.

If the criteria for placement is significantly rigorous, then the population of that facility is going to be a fairly dangerous, if you will, threat, either to individuals or to the collective system. And in that instance, I think the frequency of review is not required as frequently as if the population is a less-threatening population, would be my opinion.

And in the instance of OSP, first of all, I [914] think their old review period was more than adequate, and their new one is even more frequently, at least for the privilege levels which relate to eventually release.

Q. So the one year, is that what you are referring to?



A. Yes. I think initially for one year, although in the new policy the privilege level review can happen more frequently.

Q. Turning to Page 8 of your monograph, you write, right there which I have starred, "Objective classifications also provide, generally provide inmates with a known path for moving to less secure facilities."

Do you consider that an important aspect of extended control facilities, to have a known path for inmates to move to a less restrictive facility?

A. Well, that particular statement is about system—classification systems in general, that, yes, there should be a known path for progressing in a system.

Q. And then on Page 10, you say "Ideally," do you see that part underlined, "ideally," or blocked out, "Ideally, specific criteria should be developed, along with a process for assessment, that would allow the inmate to transition from an extended control facility to lesser levels of custody and security."

And then at the very end of that you say "Failure to provide some transition or release mechanism [915] will not only create a sense of hopelessness among many of the inmates, but will cause the overuse of costly high-security beds."

In these extended control facilities, do you find that there is a sense of hopelessness among many of the prisoners?

A. Yes.

Q. Okay. Now, at OSP, in your opinion, did OSP have specific criteria for inmates to follow to obtain release back to general population?

A. I believe it does.

And with the caveat that the override system always is available.

Q. Where did you find that specific criteria?

Could you tell us where, where it is?

A. In the classification policy.

Q. Well, which part?

Do you have the classification policy there?

A. I do not.

Q. Okay. Are you referring to Policy 111-07?

A. I'd have to look at the numbers. I'm sorry.

Q. You can look at your notes.

Tell me from your notes which policy you are talking about.

A. I do have a copy of the policy.

* * *

[920] Q. It is pre-March 1st, that's correct.



Could I see that back?

A. (Handing).

Q. Now, Mr. Riveland, did you do any study or review of inmates' files or records to determine whether inmates who had, in fact, taken these programs, had good behavior, had no conduct reports, completed GEDs, actually were released to general population?

A. I did no study to that effect, no.

Q. Did you do any investigation of that at all?

A. Only looking at the total numbers of admissions and releases.

Q. What if I told you that we heard in this case from a number of prisoners who have said that they had good conduct, they did everything that they could probably do, the system set up for them to do, and yet were not released and have not been released for a number of years?

A. I guess I'd want to know all of the information.

That behavior in and of itself is not reason for release, particularly if a supermax facility or extended control facility is rigorous in being careful about who they place in such a facility.

For example, I'd want to know what the original offense was that placed the person in that facility. Was it a multi-murder of 25 staff or two staff [921] or one inmate, or were there multiple escape attempts? Is the person a leader in a Security Threat Group?

That behavior in and of itself would not be compelling for me to say there is a problem.

Q. That's fair enough. Mr. Riveland, let me give you a hypothetical, purely a hypothetical situation.

Let's say a person gets put into OSP after being hit on the head with a spatula and the reason that's given for putting him—he was hit on the head with a spatula by another inmate. He didn't do anything.

The reason that's given is that he is a—involved in a gang. He doesn't have any particularly serious violations, but he's been involved with a gang.

I mean, he's not the type that you described.

He then does everything that's asked of him at OSP, and he goes to a committee and the committee recommends that he get released.

Goes up to a much higher level, person at a higher level recommends he gets released.

Then some other official says no.

And let's say he's been in this institution now for three years.

Would that trouble you if you heard that about some institution?

A. It wouldn't trouble me initially because I don't feel

* * *



[924] THE WITNESS: 4548.

THE COURT: Did you say he was Volume 4 or—

MS. O'BRIEN: Are you talking about the profiles?

MR. LOBEL: The profile in all of them except this one I have, he's in Volume 2 and he's at MSC 004548. They are by numerical order, and it's 208 is the number on top.

THE COURT: I'm sorry, the Bates number 4?

MR. LOBEL: At the bottom there is an MSC number.

THE COURT: Yes.

MR. LOBEL: MSC 004548.

THE COURT: Okay.

THE WITNESS: Counsel, could you repeat your question to me then?

BY MR. LOBEL:

Q. The question is apart from individual, initial placement, if this person had done everything that was asked of him at the institution at OSP and had been reviewed by the committee and recommended to be sent out, if you were using your professional judgment, do you think that he should be sent out?

A. My response would be somewhat similar as it was before, that I don't have enough information, and I base [925] that really on the last page of that profile in which it indicates that the north regional director Steve Huffman in his response indicated that he was identified as a leader with the AB, et cetera.

I guess that would lead me to want more information. I'd want to know what that meant.

Your initial description of behavior in and of itself and given his prior history, sure, that would say, sure, let's—I would question, I would say why is it we are not releasing him.

But that statement alone would make me pause and say there's something else here I don't know.

Q. In your monograph, don't you say—correct me if I am wrong—that gang membership or even gang leadership ought, in and of itself, ought not be sufficient to get into an extended control facility?

There ought to be some act of violence or some—some action, some behavior?

A. I think that membership and affiliation in and of itself probably should not be.

There are, however, in my experience, in any—not in any, but in most jurisdictions significant Security Threat Group leaders that are continuing to do business on the outside or are an extreme threat to the institution, and that should be sufficient for [926] continuation.

Q. If it was an extreme case?



A. Well, or influential in a variety of ways. And that can take place, one of the common things are continued recruitment or extortion or dealing drugs or that whole variety of—panoply of kinds of actions that if the person is influential in that, I would want to continue that person.

And I don't know about this person.

Q. Yeah. But nothing in what you see would suggest that he should be continued for a long time?

If there's something you haven't seen, that's one thing, but just from what you could read, this doesn't seem—

A. If I were a decision maker at this point and you had come to me with this conflicting recommendation, I would keep him in until I had all the information that sufficiently advised me as to what this one statement suggests.

Q. Okay.

THE COURT: Because I'm curious on this, I'm going to let him take a look at the materials.

MR. LOBEL: Okay.

THE COURT: I'm going to let you take a look at the Security Threat materials.

[927] THE WITNESS: All right.

THE COURT: Then you can try to more fully answer the question.

Why don't you go on to—

MR. LOBEL: Yes.

BY MR. LOBEL:

Q. Just in connection with Mr. Roe, you said in your initial testimony that under three years of time in one of these extended control facilities is not a long period of time, is that correct?

A. I said compared to—I believe I said in relationship to what I've seen in extended control facilities, that's not a long period of time.

Q. In relationship to these extended control facilities?

A. That is correct.

Q. Is it fair to assume, then, that three years or over is a fairly long period of time, even in comparison to extended control facilities?

A. No, I don't think I'd make that inference.

My choice of the phrase "three years" was based basically on the time of operation of this particular facility, and that's the only history that there is of OSP at this time.

Q. No, I meant you said that statement in the context that under three years' period of time to keep somebody in [928] one of these prisons is not a long period of time.

Does that mean that three years or over would be?



A. If we surveyed, for example, all of the extended control facilities that I personally have visited, five years or more would probably be closer to the norm than the three.

Q. Could I have—oh, you are going to keep that?

THE COURT: Let me ask just the attorneys to approach once.

MR. LANDES: Your Honor, are we dealing with the STG material now?

THE COURT: Let me just try to make a general characterization of it without going into any of the specific statements.

MR. LANDES: Your Honor, I don't like to interrupt, but may I offer an alternative solution?

THE COURT: Okay.

MR. LANDES: On redirect I was going to ask the witness whether it would be good practice to actually consult with the STG coordinator in making the decision.

The next witness up is the STG coordinator. His flight is not until 3:00 o'clock.

THE COURT: Well, he was asked more for the opinion on—not on the necessary practice, but he was

* * *

[933] that looked at this decided that the person should be released, and the chief of Classification looked at it and

decided he should be released, would you release this man from OSP?

A. Given the information I reviewed, I would still have two questions.

One would be what information was available to those two bodies you mentioned, the two recommending bodies, the chief of Classification and the committee; and secondly, I'd want to know more about the STG allegations.

Q. Okay. When you were the director of Washington, you said you did review committee recommendations and you used your professional judgment?

A. Actually I did not on all persons going in and out. I reviewed those who were to be retained in the facility beyond three and a half years.

Q. So anything beyond three and a half years, you had to review?

A. That is correct, if retention was to be part of that scenario.

Q. And why three and a half years?

A. It was the time we chose to place in the policy that isn't particularly relevant. It was just a point that we took it to the highest decision-making point in the organization.

[934] MR. GILBERT: Your Honor, we can't hear back here.



Q. And in general, was it the exception when you overturned the committee or did you—I assume you didn't always overturn the committee.

Can you comment on the frequency with which you overturned the committee?

A. The frequency of overturning the committee recommendation was not common, but it did occur.

Q. It occurred sometimes, but it wasn't common?

A. Yes, I'm afraid I wouldn't have a statistical relationship, but it did occur from time-to-time.

Q. Back to this policy which you testified on, and maybe there's some other—it's 111-07, was there any top—let me ask the question this way:

When you were put in OSP, you generally were put in Level 2, is that correct?

A. That is correct.

Q. And you stayed at Level 2 for approximately how long before you get—you got a review to get out of Level 2?

A. A bit in excess of a year at least.

Q. Okay. A bit in excess of a year.

You then got to Level 3.

How long were you on Level 3 before you got your review?

* * *

[939] reports for at least six months. All other criteria appear to be the subjective decisions of the local and central office classification staff."

Is it your testimony that that would be a unique situation?

A. Certainly the Florida version of that is unique, yes.

Q. You then testified that "The physical conditions observed in the majority of CM 1 units were very austere."

I'd like you to focus on the second paragraph there. I assume you are now listing some of the very austere conditions.

"The doors are metal security sliding doors with a small window at eye level, covered with transparent material and a food/cuff port generally at knee level, that port being covered and locked except when passing a food tray through it, or when handcuffing the inmate."

Do you consider that austere?

A. Not in and of itself.

Q. So when you listed this, this wasn't an example of something that's austere?

A. I think the combination of things discussed in that particular paragraph made the entire setting austere, yes.



Q. I also see you noted "Any communication must occur through a small crack in the side of the door." And then in parentheses "Although the Union Correctional Institution

* * *

[946] release date based on their behavior, programming and progress through levels."

Is that a recommendation you would generally agree with?

A. As long as it contained what I talked about before is the avenues for exception.

Q. Yeah, you would generally agree with that?

A. Generally.

Q. And this is a recommendation made by the quality review team of the Ohio correction officials.

Would you—do you know if this recommendation was carried out?

A. To my—not to my knowledge. In the applicable policies that I reviewed at the time I was on site, in its specificity it was not.

Q. It was not carried out.

So this is a policy which you agree with in general, was not carried out?

A. The part, I guess, one can quibble about months and days and whether there should be six months or eight months or three months or whatever.

The specificity of the length of stay, I think I would have some question as to how that would be worded and applied, and I would want, as I mentioned before, to have exceptions to the process, an override [947] process, if you will.

Q. So you think it's generally a good idea to have a length of stay, but with some exceptions?

A. Yes.

Q. Okay. Do you know if the new policy which you've talked about that comes into effect on March 1st, do you know if that has a length of stay and a projected release date based on behavior?

A. Not specifically, no.

Q. Not specifically?

So it didn't—they still have not implemented that recommendation?

A. No. And I—I think one would have to be cautious before taking a recommendation from any committee and saying you should automatically do that.

I would—I would want to know all of the events and the things that influence making such a decision up front.

Q. Yes.



A. If I were the director, anyway, which is what I inferred your question to mean.

Q. Let's now go back to who gets in.

First of all, you testified that you went around to each inmate and you asked them questions, that's correct?

[948] A. I did not talk with each individual inmate, no.

Q. I'm sorry, no, you went around to—I apologize.

You went around to a group of inmates and asked them questions, is that correct?

A. Well, I—I individually interviewed a number of inmates. I talked to a number of inmates at cell front. And then there were a couple of occasions when I saw them collectively.

Q. And you said you asked what you thought were the compelling questions that were important?

A. That's correct. For me to understand what they—

Q. You asked them whether they have ever committed assault, whether they have been involved in a riot, whether they were a gang member, that sort of thing?

A. Well, as relates to placement there, yes, that's correct.

Q. Placement.

Did you ask them whether they had been involved in—they had any drug offenses?

You didn't—you didn't say that you asked them that. I assume you did not?

A. It may—that would have varied by individual. I did not have that as one of the specifics I asked each of those individually-interviewed inmates, no.

Q. And is that because generally you didn't—that's [949] not generally the types of—type of offense which ought to get you in an extended control facility?

A. Well, it depends. When you say "drugs," that's a very far-reaching thing.

If it's simply an individual caught with a small amount of marijuana that they are smoking, that's not, in my mind, a reason for placement.

If they are dealing drugs or if they are moving drugs throughout an institution or bringing them in, it well could be causative for their placement.

Q. Do you think there are a lot of people at OSP whose sole reason for being there has to do with drugs?

A. If so, I certainly didn't find that in the profiling, the 444 profiles I reviewed.

Q. What if I told you, Mr. Riveland, that I went through something which is an exhibit in this case, which is called Exhibit J, and it is a summary of inmate profiles, so what the defendants did for our, you know, to make things easier is to take all those profiles and summarize them.

And let's take a look at J here.



It's an attempt at a summary.

Do you see Exhibit J?

A. I do.

Q. I'm not asking you to look at anything. I just want you to be familiar with it.

[950] A. I see it.

Q. Now, what if I told you that I went through those summaries and I specifically picked out every inmate whose only reason for being at OSP had to do with drug—drugs of some sort, you know, contraband of some sort and some of them say "major," most of them don't say "major" on that list.

And there are over 50 people at OSP whose only reason for being there, according to defendants' own summaries, are drug offenses.

Now, that wasn't what you found?

A. Absolutely not. I'd be stunned.

Q. You'd be stunned?

A. I would be wondering if they had different inmates at different time frames than the 444 I had.

Q. Well, what if I then told you I went through the profiles of those 50 people and looked at them, and I didn't look—no, I'm sorry, that was not accurate.

Let's say I told you I did a sampling of those 50 people and that, in fact, that summary of profiles was accurate in my sampling.

You'd also be shocked?

A. I would wonder where the numbers came from, over what time frame, because that certainly was not true—In—I wasn't even looking for individuals who were drug-only. [951] I separated them into the categories that I—that you stated and found nothing like that.

In fact, I found that almost every person, except the one person, had a compelling reason for being—for being placed there.

Q. Let's go to that one person you found.

Do you have your notes with you, by the way?

A. I don't have the name of that—of the 444, I do not have those notes, no.

Q. You do have your notes with you, though?

A. I only—no, I brought—I wasn't asked to bring anything, and I brought simply a small sampling to show what kind of notes I did take.

MR. LANDES: Your Honor, if I could, he came from Colorado, not from where he thought he was going to come from when he thought he was going to testify on Monday.

We did ask if he brought the notes that were inquired about—



THE COURT: Yes.

MR. LANDES: —earlier by plaintiffs' counsel, and he did happen to have those as the sample. Those were the notes concerning inmate interviews of the three inmates that they put on.

I wanted to make clear for the Court that we

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[964] Q. And call for some kind of at least a bullpen which is a larger space?

A. That's what it appears to be, yes.

Q. But you never looked at this report when you did your study because it didn't apply to supermaxes, really?

A. For two reasons.

One, that it's my impression that the ACA standards don't apply to supermaxes. That they are, at best, can be—provide some guidance, but certainly aren't the standard. The standard doesn't exist.

Secondly, because I was aware immediately of the plans, the well-developed plans even at that time for the creation of a new outdoor recreation area which far supersedes, I might suggest, what the ACA is willing to accept apparently.

Q. Yeah. That raises one other question to me.

Were a lot of these programs, proposals, changes that you observed, were they instituted or developed shortly after the filing of this lawsuit, just as a time question?

And I know you wouldn't know whether they were developed in response to the lawsuit, but, you know, was this happening prior to the filing of this lawsuit, that they were developing plans for recreation?

A. I can't say they weren't, but I'd have to say that as

* * *

[977] your notes?

Why would he tell you that and also say "By the way, I am a gang member"?

A. I don't know.

And what I don't recall is whether he said he was or is a gang member in the beginning.

If he said he was, and he felt he no longer was, then it could be that he's confused that the gang coordinator would still delay his movement per the committee recommendation.

Q. Mr. Riveland, in your—I ask you to look again at your report.

What did you write that he told you about gang membership?

A. "He states he is also a gang member."



Q. "He is a gang member"?

A. Okay.

Q. Do you think writing a report about whether somebody's a gang member is sufficiently important that you should take a certain degree of care in whether or not it was or is?

A. Absolutely.

Q. But right now you couldn't remember if it was "was" or "is"?

A. At the time I wrote the report, and the reason I [978] trust is that I wrote that within two days of returning from OSP.

It's now several months later.

Q. But if he stated that he is a gang member, isn't that totally inconsistent with what your notes say that he told you about his committee hearing?

A. I don't know that I see that inconsistency.

Q. Okay. Now, at the end of this about this summary, you say "Although none of the above-mentioned inmates state that they like living in the conditions, they generally understand why they have been placed there. They admitted to the offenses that resulted in their being at OSP—all of which qualify for High Maximum placement."

That's what they all told you?

A. That's correct.

Q. So Jason Robb, it is your testimony that Jason Robb told you that he committed an aggravated murder for which he was given the death penalty?

A. I—I don't have my notes any longer so you would have to return those to me.

Q. Sure.

THE COURT: Why don't you put it under the—put it under the thing so I can see it as well?

Q. It says "Sentenced to death." Was on—

A. Could you bring it down so I can see the list,

* * *

[982] raise.

Q. And did you learn enough from them to satisfy yourself about that?

A. That, combined with the review of the profiles, satisfied me that, yes.

Q. Why is that?

A. It seemed that, simply from the discussion with the individual inmates, that they met the criteria that I thought were valid for placement at OSP, and that was reinforced by the collective analysis of the 440 individual profiles.

Q. Bigger issue.



Did you have a systematic concern about the classification of inmates to OSP concerning STG affiliation?

A. Excuse me, I'm not sure I understand the question.

Q. Okay. Leaving the world of three inmates out of 661, did you have a systemic—I'll use that word—systemic concern about the classification practice of sending people to OSP in relation to gang affiliation?

A. It was something I felt that should be addressed, and I was interested and curious about that when I first went to OSP.

Subsequent to that, it seemed to me, from the data that I had at least, the 440 and talking to [983] individuals, that there was no abuse of placement for STG membership only.

Q. What do you rely upon for that opinion?

A. Again the collective information from the 440, and the nine, if you will, inmates who I found in that 440 that were STG and I could find no other stated reason for their being there, as well as just the discussion with a variety of inmates, cell-front and otherwise, that I had during the time that I was there.

Q. Did you have a systemic concern about classification of inmates to OSP based upon drug backgrounds?

A. Not specifically, because although I think the sales and distribution of drugs can be a factor in placing

somebody in a high custody level, I was more interested in the other specific characteristics.

Q. Does drug—does the difference between classifying someone with drug background to max or high max depend upon detail, amounts, whether they were trafficking, things like that?

A. In my opinion it should be involved with the trafficking and frequently it's also an STG-related thing.

It's not infrequent that it's STG-related, and that's why you will find—frequently find the two linked when the person is identified as one or the other, STG leader or a big distributor.

* * *

[990] let me ask the question, it will be clear.

THE COURT: Okay.

BY MR. LANDES:

Q. Go ahead and take a look at this, please, under procedures.

It has assignment criteria and behavioral criteria, and I think I got it all on there in one screen.

Is that within generally accepted practice, those kinds of criteria?

A. Yes.



Q. Okay. Is it a common—also a common practice to use as exit criteria, or let's call it this, retention criteria, the same thing as your entrance criteria?

A. It is.

Q. So in that sense, there is a retention criteria or exit criteria in this policy?

A. In that sense.

Q. Tell me this: In your examination of the practice of retention of inmates at OSP, were those criteria employed?

A. I believe so, yes.

Q. Why do you say that?

A. Having had the opportunity to observe both hearings as well as the—some of the files and talk to some of the inmates, it appeared that there's a general knowledge that one had to mitigate those criteria in order to be either [991] moved down a level or numbers of levels or be considered for release.

Q. Is it also accepted practice to go back over five years in the past to assist in the judgment on classification?

THE COURT: Let me just—try not to lead the witness so much.

MR. LANDES: Yes. Yes, Your Honor. I try to do that for introductory and for efficiency, but I will yield to you, Your Honor.

A. I think for purposes of override, it is appropriate to go back whatever period of time is necessary to assure continued safety for staff, other inmates and the public.

Q. Could you tell the Court whether it's typical for a small percentage of inmates in an inmate population to be confined in high security institutions like OSP?

A. It is.

Q. You were asked about the frequency of review for reclassification and transfer.

What did you learn, if anything, at OSP about the behavioral management plans and the reviews that went in with those?

A. I believe that they were consistently applied. I looked to see if they, indeed, had been following their own policy. They had.

* * *

[993] doors or windows—and windows were not openable at all—just means a retention of either heat or, I suppose, in the abstract weather cold, but mostly heat in the cells.

Q. Thank you.

You were asked some questions about ACA accreditation.

Do you know if, in fact, the ACA accredited OSP both times it saw it?

A. It did.



Q. You were shown actually the first one, the old one.

Do you know what the ACA had to say about recreation in their more recent accreditation?

A. I do not.

Q. Okay. Would you be surprised to learn that they—

MR. LOBEL: Objection.

Q. —did not have an objection to that?

MR. LOBEL: I object to that.

THE COURT: I'm sorry, the question was you would be surprised to learn that they—

MR. LANDES: They did not object to outdoor recreation in the more recent report.

THE COURT: Overruled. Overruled.

Go ahead and answer.

You said you don't know, in any case?

A. I don't know, and I'd be curious. I'm not so sure

* * *

[1020] So it did strike me as a fairly quieter, quiet environment.

Q. We have been having some discussions about inmates who may—let me go back.

When you were there, did you observe inmates communicating with one another?

A. No. I observed there was some indications where they have two inmates who are recreating together, but I didn't—I didn't notice much communication because the inmates were almost always being brought out in isolation with no—I didn't see any contact with other inmates except for those situations in the housing units where they could recreate together.

And that was just two at a time.

Q. We have been hearing a lot of discussion about inmates who may be at OSP for a long time.

A. Um-hmm.

Q. And in your experience, is that atypical?

A. In every ad. seg. or supermax, you are going to have a pool of inmates that are going to spend many, many years in that unit because the nature of the offense that they committed while in general population was so severe that the department simply cannot take a risk on releasing them into the general population, and I guess at the pace the other inmates would be eligible to do that.



* * *

[1023] from the general population, either for protective custody or for mental health reasons or medical reasons or in this case administrative segregation reasons, states do not have scoring instruments that do that.

This is almost always a judgment call, professional judgment call, that's reviewed by a number of individuals and officers within the department based on criteria. But the criteria is purposely—I won't say it's overly broad, but it's broad enough so that, you know, judgment can enter into this decision, because scoring instruments just don't work very well.

It is a very small population they are looking for and so it's almost—it is always based on a judgment call with proper documentation.

Q. The criteria you are discussing that you just discussed, can that criteria for retention be the same as criteria for placement?

A. Well, if you're asking can the retention criteria be scored, is that what you're asking?

Q. No, what I'm asking is you were discussing a criteria for release?

A. I was talking about the scoring system to just classify inmates for the general population.

But to admit someone into administrative segregation or supermax unit or to release them, there are [1024] no—no states that I know of that use a scoring instrument to do that.

They have criteria. It's explicit as it can be made and it's to be based on objective data, but it's not a scoring instrument.

Q. Can that criteria that you just discussed be the same criteria as the entry or placement criteria?

A. For supermax?

Q. Yeah. Well, yes.

A. Well, no. I think it would be different because to get into a supermax, you are basically looking for have they participated in a serious incident that warrants their removal.

To be released from the unit, you would look at the incident that resulted in the admission, but then your primary concern is based on the inmate's behavior in the unit and his attitude and how the entire prison system is operating, is it safe to release this inmate back to the general population.

Q. Can you make that determination only on objective factors?

A. Well, there are factors that you would look at that need to be evaluated and that should be done based on objective data, but ultimately it's going to be a subjective judgment by a person or an office which is going [1025] to be based on their experience and how they feel about the risk.

So it's analogous to what we have now in the airlines. When a pilot feels, you know, he doesn't feel that you should be on that plane because you might be a risk, he's looking at criteria. But ultimately that pilot has the authority to make a judgment call.



And that judgment call is necessarily subjective.

Q. Did you see that happening at OSP for the release?

A. I did not—I did not observe the release decision-making process so I cannot tell you.

I just—I just noted how many people were being released. So I did not observe that decision-making process.

Q. Based on the number of releases that you saw, did you have a concern with the release procedure?

A. No, the only concern that I had which was noted in my report was that the committee which initiates the recommendation was recommending either being placed in another level or released more frequently than the warden and people outside, and I had a concern that those two parties should be more in sync with their criteria, which I didn't think they were at that point.

But I didn't have—I didn't see anything in

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[1029] Q. Yes.

A. And then you also use that for the release decision?

Q. Can you also use that?

A. Oh, yes. Yes.

Well, I mean, some do obviously. I mean, again the issue on some of these is, you know, these are the indicators that got them in. Are they still reflecting these same areas of concern?

Q. And that Defendant's Exhibit F which seems to have gotten lost on its way to you, on—

A. What's it called?

Q. Defendants' Exhibit—supervision review form, Defendants' Exhibit F?

A. Uh-huh.

Q. On the second page of that document?

A. That's the one I don't think—I don't know if I have that.

Q. Right. On the second page of that document, it has higher custody discretionary overrides.

A. Okay.

Q. And it lists eight different criteria.

A. I've got that.

Q. You have it? Okay.

Could those also be the criteria used for release or reduction or retention?

[1030] A. Yes.



Q. What else would you look at when you—or what else should a department look at if they are looking to reduce someone in security level from high max?

A. Well, again they should be looking at the inmate's behavior in that unit and his, I guess, appreciation of what he did and the reason that—him taking some responsibility for that, and some indication from him that he intends not to get involved in that situation.

Now, the other thing that you've got to look at, even though it may be a reduced probability that that inmate may engage in such behavior, especially violent behavior, if the inmate were to do that, what are the liability issues that the department will suffer if that inmate does engage in behavior that results in serious injury or death to another inmate or staff member.

Because if that happens, they will have serious liability issues when that occurs.

So that's why these decisions are somewhat conservative in nature because let's say you are right 80% of the time, if you are wrong 20% of the time, you'll be suffering greatly in court costs and settlement damages because attorneys are going to argue "Why did you ever release this person who was in supermax and had this history? Even though they were doing fine, you let them [1031] out and they have gone out and done it again."

So it's a very difficult decision to make.

Q. I'm going to ask you to look at the new policy which is Defendant's Exhibit C.

A. Right.

Q. And that's 12 pages long, new Policy 111-07, it's—

A. Dated March 1st.

Q. Yes, effective date March 1st?

A. Yes.

Q. Have you reviewed that policy?

A. Pardon?

Q. Have you reviewed that policy?

A. Yes.

Q. And have you noted any changes from the previous policy to this policy?

A. Well, they have clarified in my—well, there's several things that they have done.

Number one, I had requested in my recommendations that the Bureau of Classification have the final say in the admission and release decisions. And that's now in the policy.

They have clarified a couple of the factors that would get you into the Level 5 category so it's clearer to an outside person.

Excuse me. I think those were the major [1032] changes that I saw which helped, I think, narrow the



classification or the criteria for going in and getting out and also the decision-making process.

Q. The criteria for getting out and what the department should take into consideration can be found on Page 9?

A. Pardon?

Q. Can be found on Page 9 of that report? Can you turn to that page, please?

A. Yes.

Q. And in there, it talks about behavior in the last five years, including—

A. Right.

Q. —to Level 4 or 5?

A. Right.

Q. Should the department only look at the behavior in the last five years?

A. Well, no, they should—I think that may be the focus, but you should be looking at the entire picture.

These inmates, again, these are very special situations, so I would be looking at the entire record of the inmate just to make sure you are capturing everything.

I should also—I didn't mention, they also I think put in time left to spend on the current sentence. And I thought that was important because some of the inmates that I

observed in OSP were getting close to that, their maximum release dates. [1033] So those inmates, inmates who are getting close to their maximum release dates and are behaving properly, would have a higher probability of getting out because you want them to have some kind of decompression on that unit before they get released into the streets.

Q. Just because you are close to your release date doesn't mean you should be let out, correct?

A. No, it's a factor. It's a factor.

In other words, I think whenever possible—and this is a big push across the country is reentry—you want to try to prepare inmates as best you can, and it's not good to have inmates walking directly out of the OSP to the streets. So you would want to try and work that.

But again there are going to be some inmates you wouldn't do that for because of their behavior at OSP or because of other factors that might be relevant. It would be a case-by-case decision.

Q. Would it ever be a good idea in a classification policy to guarantee release after X number of years?

A. I don't think you can do that. I don't think you can do that realistically.

Q. Why not?

A. Well, it gets back to the point that you have to recognize that these are not—these kinds of decisions, [1034] the decisions are based upon the judgment of people that are specialized in this area.



You can't promise anyone release from this. You can say these are the guidelines, and if you do these things in general, people are going to get released, you know, within this time frame.

But to promise release I think is inappropriate for this type of a population.

I don't know how best to describe—how else to describe it. It's just, it's too—too much of a high risk decision where you would always want to have the ability to retain someone in there if you think, you know, they need to be.

Now, the danger here obviously is someone getting caught—and plaintiffs mentioned this to me, their concern, you know, about people being kept there indefinitely without good reason. It doesn't mean that happens.

I mean, you have to give reasonable explanation as to why the person is being kept there. And again from what I've seen in Ohio, the vast majority of inmates are going to be released.

But there's going to be some group, and they have to be looked at case-by-case and people may differ on whether or not it's a fair decision or not, but ultimately

* * *

[1037] Q. You had four major findings, I believe.

Can you go over those, please?

A. Yes.

They had a sound classification process. I'm talking about the overall classification system. And it's a system I'm familiar with, and it's been tested and validated. I understand research has been done underneath it.

And it's a system that restricts the number of people that can be classified as what they call high maximum. So it's not a system that you can easily get put into high maximum. Therefore, most inmates don't go there. In fact, a very small percentage go there.

The inmates there have good institutional records. When I look through their records, they are behaving. Part of that is because they don't have much of an opportunity to assault people, but even in terms of other areas where they can be written up, I observe very few disciplinary reports since their arrival at OSP.

There is a growing number of inmates who—this group will increase, you know, at some point, by what level I don't know, but will not be released for some time regardless of their behavior, and that's just—you know, that group exists and needs to be reckoned with.

* * *

[1039] areas that I thought it should be—should be changed.

And I think they have done that, though, in the new policies.

Q. So the new policy does address those concerns that you had?

A. Yes. From my perspective, yes.



Q. Dr. Austin, what, in your opinion, is the role of professional judgment or subjectivity in these decisions?

A. It's very critical.

As I say, I talk about subjectivity and subjective decision-making. It's not that it's unfounded. I mean, it has to be founded in data, good information that's been verified.

But once—once you have all that information, I guess much like a Judge, you know, you make a decision based on the information and you are trying to get the best information available, and you are looking at a decision that serves the interests of all the parties. It has to serve the interest of the inmate, but it also has to serve the interest of the other inmates that are out there or the staff who might be jeopardized, whose safety might be jeopardized if the inmate is incorrectly released.

Q. And would it be—

A. So that's—that is by nature going to be a judgment call, but hopefully it's done, you know, looking at all [1040] those factors and making a reasonable decision.

Q. And in your judgment, should that subjectivity be or should the decisions—let me try to phrase a question here. I'm sorry.

Would it be—

THE COURT: I think, if you are going where I think you are going, you have already asked it two or three times already about whether there should be specific rules.

No. 04-495

MAR 4 - 2005
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# In The Supreme Court of the United States

REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

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## QUESTION PRESENTED

In light of the findings of the district court that confinement in the Ohio State Penitentiary imposed an "atypical and significant hardship" on prisoners confined there, and that placements at the prison occurred in an arbitrary and haphazard fashion, are the procedures ordered by the court below an appropriate remedy?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| STATEMENT OF THE CASE | 1 |
| I. Hardship Of OSP Confinement | 1 |
| II. A Pattern Of Subjective, Haphazard And Arbitrary Decisionmaking | 4 |
| A. Initial Transfers | 5 |
| B. Policy 111-07 And Arbitrary Decisionmaking | 5 |
| C. New Policy 111-07: An Inadequate Remedy | 9 |
| SUMMARY OF THE ARGUMENT | 12 |
| ARGUMENT | 14 |
| I. The Courts Below Appropriately Applied *Mathews v. Eldridge* In Determining What Process Was Due | 14 |
| A. First *Mathews* Factor: The Private Interest Of Prisoners In Avoiding Supermax Confinement Is Very Great | 15 |
| B. Second *Mathews* Factor: A Serious Risk Of Erroneous Decisions Was Demonstrated At Trial, And Revised Policy 111-07 Significantly Enhances Careful And Accurate Decisionmaking | 19 |
| 1. The Lower Courts Found A Pattern Of Haphazard Decisionmaking | 19 |




TABLE OF CONTENTS – Continued


| | Page |
|---|---|
| a. Security Classification Based On Alleged Membership Or Leadership In A Prison Gang Is A Particularly Fertile Source Of Subjective And Arbitrary Classification Decisions | 20 |
| b. Central To The District Court's Concerns About Arbitrary Placement Was Systemic Evidence That The Bureau Of Classification Was Overruling Its Own Classification Committees And Wardens In Placing And Retaining Inmates At OSP | 24 |
| 2. The Procedural Requirements The District Court Ordered Were Designed To Reduce The Risk Of Erroneous Decisionmaking Found To Exist At OSP | 26 |
| C. Third *Mathews* Factor: Revised Policy 111-07 Does Not Harm The State's Interest | 33 |
| 1. The Federal Government And Other State Governments Utilize Procedures To Place Prisoners In Their Most Restrictive Units Or Facilities Substantially Similar To Those Ordered By The District Court | 33 |
| 2. Ohio's Objections Do Not Demonstrate That Revised Policy 111-07 Imposes Any Significant Burdens On The State | 39 |
| II. This Case Is Dramatically Different From *Hewitt V. Helms*, And That Decision Does Not Govern | 40 |

TABLE OF CONTENTS – Continued

Page

A. Ohio's "Supermax" Confinement Is Far More Burdensome Than The Temporary Administrative Segregation At Issue In *Hewitt* ..... 41

B. The Retrospective Component In Supermax Placement Decisions Is Far Stronger Than In A Probable Cause Hearing Preceding Investigation Of Alleged Misconduct ..... 42

C. This Court Requires Careful Fact-Finding Pursuant To *Mathews V. Eldridge* Even In "Predictive" Decisions ..... 45

CONCLUSION ..... 50



TABLE OF AUTHORITIES

Page

CASES

*Addington v. Texas*, 441 U.S. 418 (1979) ..... 46

*Austin v. Wilkinson*, Case No. 03-3840 (6th Cir., *appeal pending*) ..... 18

*Ballard v. Commissioner of Internal Revenue*, 321 F.3d 1037 (11th Cir. 2003), *cert. granted*, 124 S.Ct. 2065 (2004) ..... 25

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*Chavis v. Rowe*, 643 F.2d 1281 (7th Cir. 1981), *cert. den.*, 454 U.S. 907 (1981) ..... 28

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*Dunlop v. Bachowski*, 421 U.S. 560 (1975) ..... 28

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*Garner v. Jones*, 529 U.S. 244 (2000) ..... 17

*Goss v. Lopez*, 419 U.S. 565 (1975) ..... 48

*Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975) ..... 48

*Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*, 442 U.S. 1 (1979) ..... 47, 49

*Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) ..... 32, 40

*Hensley v. Wilson*, 850 F.2d 269 (6th Cir. 1988) ..... 26

TABLE OF AUTHORITIES – Continued

Page

*Hewitt v. Helms*, 459 U.S. 460 (1983) ..... *passim*

*Hutto v. Finney*, 437 U.S. 678 (1978) ..... 33

*In re Berkan*, 648 F.2d 1386 (1st Cir. 1981) ..... 25

*Jackson v. Ward*, 458 F.Supp. 546 (W.D.N.Y. 1978) ..... 28

*Koch v. Lewis*, 96 F.Supp.2d 949 (D.Ariz. 2000) ..... 23

*Koch v. Lewis*, 216 F.Supp.2d 994 (D.Ariz. 2001), *appeal dismissed sub nom. Koch v. Ryan*, 335 F.3d 993 (9th Cir. 2003) ..... 23

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... *passim*

*Mattox v. Disciplinary Panel of United States District Court*, 758 F.2d 1362 (10th Cir. 1985) ..... 25

*Morrissey v. Brewer*, 408 U.S. 471 (1972) ..... 31, 32, 46

*McKune v. Lile*, 536 U.S. 24 (2002) ..... 15, 16

*M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) ..... 26

*Penson v. Ohio*, 488 U.S. 75 (1988) ..... 28

*Sandin v. Conner*, 515 U.S. 472 (1995) .....3, 13, 15, 16, 30

*Sheley v. Dugger*, 833 F.2d 1420 (11th Cir. 1987) ..... 25

*Toussaint v. McCarthy*, 926 F.2d 800 (9th Cir. 1990) ..... 25

*United States v. Raddatz*, 447 U.S. 667 (1980) ..... 24, 25

*United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000) ..... 16

*United States v. Salerno*, 481 U.S. 739 (1987) ..... 45

*Vitek v. Jones*, 445 U.S. 480 (1980) ..... 19, 46

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TABLE OF AUTHORITIES – Continued

Page

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*Zadvydas v. Davis*, 533 U.S. 678 (2001) ..... 45

STATUTES AND REGULATIONS

Alaska Department of Corrections, Policy #735.03 ..... 35

Arizona Department of Corrections, Department Order 801 ..... 38

Colorado Department of Corrections, Administrative Regulation 600-02, available at http://www.doc.state.co.us/admin_reg/PDFs/0600_02.pdf ..... 35, 38

Fed. Reg. 32991, Aug. 17, 1984 ..... 35

Georgia Rules and Regulations, § 125-3-1-.03 ..... 37

Iowa Department of Corrections, Policy IN-V-05 ..... 37

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TABLE OF AUTHORITIES – Continued

Page

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## STATEMENT OF THE CASE

### I. Hardship Of OSP Confinement

The courts below held that confinement at the Ohio State Penitentiary (hereafter, "OSP") creates an "atypical and significant hardship." They based their opinions on three factors: (1) what Judge Rogers of the court of appeals panel termed the "extraordinarily strict conditions" of confinement, Pet.App. 27a (Rogers, J., concurring in part, dissenting in part); (2) the indeterminate and often extremely lengthy duration of confinement; and (3) the automatic disqualification from eligibility for parole. Ohio has not challenged the district court's factual findings. *Id.* 10a, 22a.

High maximum security (Level 5) prisoners at OSP are locked in single cells except for approximately five one-hour periods per week. Pet.App. 52a-53a, 57a; Joint Appendix (hereafter "JA") 35, 102. Each cell measures approximately 89.7 square feet, has a sink and toilet, a small desk, a concrete immovable stool, a narrow concrete slab with a thin mattress, and a narrow window to the outside that cannot be opened and that does not comply with the standards of the American Correctional Association. Pet.App. 53a. Unlike cells in any other Ohio prison or even segregation unit, OSP has solid steel cell doors with metal strips along the sides and bottoms of the doors "that do not allow conversation with adjacent inmates." *Id.* 53a, 92a. "The conditions at the OSP do not allow any amelioration of the prolonged isolation designed into the OSP's structure." *Id.* 55a.

OSP was constructed without outdoor recreation facilities. At the time of trial, many prisoners had not been outside the walls of OSP for almost four years. Pet.App. 92a. Prisoners' only access to the outdoors was in small,

completely enclosed exercise rooms about the size of their cells located inside the building, which had a grated opening approximately six inches wide and four feet high. Ohio termed this room the "outdoor exercise" area, but the district court found "it hard to believe anyone would seriously suggest such a space constitutes outdoor recreation." *Id.* 93a. The American Correctional Association found that OSP's recreational facilities violated the generally accepted correctional practices expressed in its standards. *Id.* 54a.

Prisoners at OSP "have extremely limited contact with other individuals." Pet.App. 92a. Phone calls can be made only to approved persons; an unsuccessful attempt may count as one of one or two ten-minute phone calls allowed per month. *Id.* 57a; First Amended Complaint and Answer, Docs. 20 and 27, ¶ 51; JA 34, 101. Any time prisoners leave their cellblocks, they are strip-searched, shackled and placed in full restraints, which include an uncomfortable "black box" that holds their hands in a rigid position. OSP inmates are strip-searched before and after visits even though physical contact with visitors, who are behind solid glass, is impossible. Pet.App. 93a. No work assignments are offered other than one porter's job in each pod. There are no educational programs beyond the GED level, which, the court found, reach the prisoner through closed-circuit TV and self-study workbooks, and offer no human contact. *Id.* 57a. There are no vocational or job-readiness programs. Docs. 20 and 27, ¶ 54; Pet.App. 57a. Prisoners are not permitted to share books, magazines, or other personal property. *Id.* 55a-56a. Prisoners may be punished if they save a piece of bread or a packet of sugar from a food tray for a snack at a later time, or place any



photographs or other items on the cell walls. Docs. 20 and 27, ¶ 43.

These conditions are significantly more harsh than conditions in any other form of administrative detention in Ohio. They are harsher than conditions in Administrative Control on Death Row, where prisoners have "outdoor recreation, more access to personal property, more access to telephone usage, and more access to counsel." Pet.App. 54a-56a.

During the first two years of operation, there were three suicides at OSP. First Amended Complaint and Answer of Defendants, Docs. 20 and 27, ¶ 79.

The district court also emphasized the indefinite and often very lengthy duration of confinement at OSP. The court found that the "vast majority of inmates placed at the OSP will remain there for a minimum of two years, with only an annual review of their status." Pet.App. 90a. At the time of trial, 200 OSP prisoners had been there for more than three years, a duration limited solely by the circumstance that OSP had then only been open for slightly more than three and one-half years. *Id.* 90a, 96a. As the district court found, "even with good behavior, inmates at the OSP serve indefinite terms at the institution." *Id.* 91a.

Finally, placement at OSP automatically disqualifies a prisoner for parole. The district court found that there were prisoners who met the parole guidelines and whom the Parole Board was ready to release, but were denied parole under this rule. In the court of appeals, Judge Rogers placed particular emphasis on the rule suspending parole eligibility for all prisoners at OSP. Pet.App. 27a, citing *Sandin v. Conner*, 515 U.S. 472, 487 (1995) ("finding no protected liberty interest in remaining free

from disciplinary segregation, but noting that disciplinary record did not preclude parole").

The district court concluded that prisoners at OSP have a constitutionally-protected liberty interest. Pet.App. 39a, 96a. All three judges in the court of appeals panel agreed. *Id.* 14a, 26a-28a.

## II. A Pattern Of Subjective, Haphazard And Arbitrary Decisionmaking

After a trial involving twenty witnesses and more than a thousand pages of exhibits, Pet.App. 48a, the district court found that "the Department's procedure for selecting and retaining inmates at the OSP has great potential for error." *Id.* 102a. The court of appeals affirmed, relying on the district court's "specific findings concerning past erroneous and haphazard placements at OSP, which go unchallenged on appeal." *Id.* 22a.

The district court found that there was an institutional bias toward transfer of prisoners to OSP so as to fill it. During the five years before OSP opened, the twenty cells in the high maximum security block at Ohio's maximum security prison, the Southern Ohio Correctional Facility (hereafter, "SOCF"), were less than half full most of the time. Pet.App. 51a, citing testimony of Peter Davis, JA 293. The evidence led the district court to find that Ohio had created "too much capacity" for high maximum cells and "insufficient capacity" at maximum security, "causing an imbalance in assigning prisoners to appropriate confinement." Pet.App. 51a-52a. As a result, prison officials transferred to OSP prisoners who did not need its level of restrictions. *Id.* 52a.



### A. Initial Transfers

Ohio began transferring prisoners to OSP in May 1998. In violation of Ohio Administrative Rule 5120-9-53, JA 13, the initial transferees to OSP received neither notice that they were being considered for reclassification to high maximum security nor an opportunity to be heard. The Department sent more than 100 prisoners to OSP before adopting a written policy as to who should be placed in high maximum security. Pet.App. 58a.

A quality review team made up entirely of high-ranking Department personnel visited OSP in December 1998 and issued a report consistent with "plaintiffs' claim that no clear standard describes which inmates would be placed at the OSP." Pet.App. 51a. At the time of these initial transfers, "the Department had no policy in effect identifying which inmates could suitably be placed at the OSP. . . . Without any set criteria, similarly situated inmates were often treated differently." *Id.* 58a.

### B. Policy 111-07 And Arbitrary Decisionmaking

In August 1998, the Department "attempted to establish some predictability to placement at the OSP" by issuing Policy 111-07. Slightly modified in January 1999, this policy ("Old Policy 111-07") remained in effect at the time of trial in January 2002. Pet.App. 59a.

The district court found that arbitrary and haphazard placements at OSP continued despite the promulgation of Policy 111-07. The court concluded that Ohio had violated the prisoners' right to due process by denying them adequate notice, adequate hearings, and an adequate explanation of its decisions. Pet.App. 39a.

The case of James DeJarnette illustrates the haphazard system of placement and retention at time of trial. DeJarnette assaulted an officer at Orient Correctional Institution while intoxicated. A classification committee at Orient (a medium security facility) concluded that placement in high maximum security and transfer to OSP were not appropriate, and recommended Administrative Control. The warden agreed. Nevertheless, the Bureau of Classification increased DeJarnette's security classification to high maximum and transferred him to OSP in October 1998 without notice or explanation. Pet.App. 62a.

In November 2000, the OSP classification committee recommended that DeJarnette be reduced in security classification and transferred out of OSP because of his "good adjustment" and the fact that he was "not a behavioral problem," but higher administrators disagreed and DeJarnette was retained at OSP. Pet.App. 64a. The ultimate decisionmaker "never heard from DeJarnette before deciding to keep him at the OSP, never fully explained his reasons behind the decision, and never told DeJarnette what issues prevented a reduction in his security level." *Id.*

The district court found that DeJarnette's case also exemplified the effect placement at the OSP has on parole eligibility. Pet.App. 62a. Ohio has a policy that

> stops consideration of parole for prisoners in the high maximum or maximum security classifications. (Pls.' Ex. 3 at 8 [ODRC Policy 501.36, JA 152]). To receive parole, an OSP inmate must first be reclassified to maximum security. Once he spends approximately a year at maximum security he may be reclassified to close security and be eligible for parole.



*Id.* 94a. The Parole Board was ready to release DeJarnette but could not do so because he was at OSP. *Id.* 63a-64a, citing Ohio Parole Board Decision, Pl.Ex. DeJarnette-9, JA 187 ("He has served above the recommended range. However, his Security Status prevents a release recommendation").

Similarly, the district court found that Ohio's questionable decisions to place and retain Daryl Heard and Keith Gardner at OSP rendered these prisoners ineligible for parole. Heard was jumped four security levels from minimum to high maximum security for being involved in a scheme to bring marijuana into a prison. Pet.App. 65a. Under the Parole Board guidelines, Heard should have been paroled after serving 156-192 months. He had served 235 months and had not been involved in violence within the previous sixty months, but was denied parole because of his high maximum security classification. *Id.* 67a, 95a. Gardner, according to the district court, was also denied parole because "the Department's rule forbidding parole release from high maximum security denied the parole board an opportunity to exercise its discretion." *Id.* 69a.

The haphazard system of placement and retention at OSP was further exemplified by Kevin Roe and Lahray Thompson who were transferred to OSP in 1999, without notice or hearing, based upon "essentially no evidence" showing that either man was connected to gang-related tension. Both were retained at OSP despite no evidence of current gang activity. Pet.App. 74a-80a, 103a, 108a-110a.

The problems of these five class representatives were typical. "The reclassification committee's recommendations are often cursorily denied by someone for reasons the inmate never knew were at issue." Pet.App. 117a. During

a twelve-month period prior to trial reviewed by the Department's classification expert, only 71 of 157 prisoners recommended for security reduction by the OSP classification committee were ultimately approved for reduction. *Id.* 81a, 110a-111a. Ohio's expert witnesses testified that this high rate of reversal was "not common," "excessive" and "not good." *Id.* 81a-82a, citing the testimony of Chase Riveland, Tr. 934; testimony of James Austin, JA 449-450.[1]

This disturbing "excessive" reversal rate was aggravated by Ohio's particular classification process. The classification committee is the only entity before which the prisoner has a right to appear, but the classification committee merely recommends. The higher official who makes the ultimate decision in most cases gives only a one- or two-sentence boilerplate explanation. "Even if an inmate were able to see this explanation, such a cursory statement would not adequately inform him of evidence justifying the reviewer's decision." Pet.App. 111a.

The district court found that the Department denied the prisoners due process by failing to afford notice and an adequate opportunity to be heard before placement at OSP; by failing to give sufficient notice of the grounds serving as the basis for retention at OSP; and by failing to

[1] James Austin testified as to the confusion caused when committee recommendations were reversed by higher-ups: "Because if I was an inmate, I would say 'Tell me what the game is that I got to do. If I want to get back . . . out into the general population, you all tell me what I need to do.'" Austin continued: "So if you have one release authority saying 'Yeah, we do think you are ready to go,' and another one cutting half of those, then that's not good." JA 450. See also Pet.App. 96a, quoting Austin: "I mean, you have to give reasonable explanation as to why the person is being kept there."



give the prisoners sufficient opportunity to understand the reasoning and evidence used to retain them at OSP. Pet.App. 39a, 111a.

### C. New Policy 111-07: An Inadequate Remedy

On the eve of trial, Ohio promulgated a new version of Policy 111-07, JA 15-36 (hereafter, "New Policy 111-07"), which was to take effect on March 1, 2002. Ohio argues that injunctive relief was unnecessary because New Policy 111-07 would correct any earlier problems. Pet.App. 112a. The district court disagreed.

According to the district court, a fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. Pet.App. 107a, citing *Mathews v. Edlridge*, 424 U.S. 319, 333 (1976). The hearings provided by New Policy 111-07 to place and retain prisoners at OSP were not "meaningful" because prisoners would be given inadequate information about the basis of the charges against them.

Specifically, the district court found that New Policy 111-07 failed to afford due process in the following respects with regard to placement and retention at OSP:

– The Notice of Hearing does not ensure that inmates are given notice of the specific grounds for which they are being considered for placement at OSP, nor notice of the evidence relied upon, Pet.App. 113a;

– New Policy 111-07 does not call for any information to be given to the inmate prior to the retention hearing and prisoners are given no notice of the grounds claimed to support their retention, *id.* 118a;

– New Policy 111-07 does not require the true decisionmaker to give "any explanation" in support of his decision to place or retain a prisoner at OSP, *id.* 116a-117a;

– New Policy 111-07 does not describe the specific conduct necessary for a prisoner to leave OSP, and lacks a defined standard for determining whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security, *id.* 119a.

The district court therefore held that while New Policy 111-07 improved the Department's placement and retention policies, particular additional modifications were necessary to remedy the constitutional defects revealed by the evidence at trial. Pet.App. 113a. Accordingly, the district court ordered the parties to file proposed injunctive orders that would extend no further than necessary to correct the violation of the federal right by the least intrusive means. *Id.* 121a. After the Department complied, the court adopted the defendants' proposed policy (hereafter, "Revised Policy 111-07") with certain changes not at issue. *Id.* 36a-37a, JA 70-104.

Ohio objects to the following modifications of Policy 111-07 ordered by the district court, Pet.Br. at 11-12:

– To provide the prisoner with written notice of all the grounds believed to justify his placement at Level 5 and a summary of the evidence relied on for the placement, Pet.App. 40a;

– At the classification committee hearing, to allow the prisoner an opportunity to call reasonable witnesses and present documentary evidence as long as permitting him



to do so will not be unduly hazardous or burdensome to institutional safety or correctional goals, *id.* 36a-37a;

– If Ohio wants to use the statement of a witness whose identity it wishes to withhold, or to rely on a statement not made known to the prisoner, to indicate this reliance and disclose to the prisoner as much of the substance of the information as possible, and provide the prisoner a reasonable opportunity to respond through a written statement and/or documentary evidence, *id.* 40a-41a;

– To give the prisoner written notice of the recommendations of the classification committee and the warden, including the justification for the recommendation and a summary of the evidence supporting the recommendation, *id.* 41a-42a;

– To record a detailed and specific justification for the final decision of the Bureau of Classification.

> The justification shall set out all grounds justifying the inmates' placement at Level 5 classification and will not use conclusory or boilerplate language. The justification statement shall describe the facts relied upon and the reasoning used. This written statement shall address an inmate's specific case and not contain merely vague boilerplate language. . . .

*Id.* 42a;

– To advise the prisoner what specific conduct is necessary for that prisoner to be reduced from Level 5 and

the amount of time it will take before reduction of the prisoner's security level classification. *Id.* 44a.[2]

Ohio seeks to return to the unmodified New Policy 111-07 which would permit placement or retention of a prisoner on Level 5 at OSP – under extraordinarily harsh conditions, for a very long and indeterminate time, postponing parole eligibility for years – without having given him notice of all the grounds believed to justify his placement at Level 5 or a summary of the evidence relied on, without a final decision that describes the facts relied upon and the reasoning used, and without telling him what he needs to do to get out. Pet.App. 40a, 42a, 44a.

The district court recognized the principle that federal courts are hesitant to interfere with the administration of prisons, Pet.App. 83a, but held on the basis of an exhaustive factual record that the narrowly tailored procedural modifications it ordered were needed to address the problems found to exist at trial. The court of appeals determined that the modifications ordered by the district court were necessary to protect the prisoners' liberty interest. *Id.* 25a.

## SUMMARY OF THE ARGUMENT

The proper framework for evaluating whether state procedures meet due process requirements is set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). This

[2] The district court later clarified that the notice of progress toward security level reduction "is meant to be advisory and is not binding on the classification committee, warden, or the Bureau of Classification." Order, July 12, 2002, Doc. 312.



test requires examination of the particular factual context. Not only private and governmental interests must be weighed, but also the risk of erroneous decisions and the extent to which court-ordered procedures will increase the accuracy of decisionmaking.

Based upon an exhaustive factual record, the courts below found that incarceration in the Ohio State Penitentiary (OSP) is an "atypical and significant hardship" and that prisoners at OSP therefore have a liberty interest under *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Prisoners at OSP are kept in solitary confinement under very strict conditions. In contrast to many "supermax" prisons, the duration of confinement at OSP is not limited to a period of years but is indefinite, and OSP prisoners have no possibility of parole.

The liberty interest of prisoners at OSP is far greater than the liberty interest at issue in *Hewitt v. Helms*, 459 U.S. 460 (1983), which involved temporary segregation pending investigation. All the more important, accordingly, are procedures for placement and retention at OSP that enhance careful and accurate decisions.

The district court found a pattern of arbitrary, erroneous and haphazard decisionmaking at OSP, and correctly determined that Ohio's "New Policy 111-07" would not provide basic due process: notice of charges, meaningful hearing, and reasoned decisionmaking.

There is no bright line rule to be applied across-the-board regardless of the facts in particular situations. Reasonable policy choices can be made by different prison administrations. The federal Bureau of Prisons and a number of states use procedures for administrative placement in their most restrictive prison settings that are

virtually identical to those ordered by the courts below in this case, demonstrating that the procedures at issue are not inconsistent with sound penological practice.

The court of appeals held that the district court properly considered the complex factual issues in this case, found serious violations of the prisoners' due process rights, and narrowly tailored the remedy to correct the violations by the least intrusive means. That decision should be affirmed.

## ARGUMENT

### I. The Courts Below Correctly Applied *Mathews v. Eldridge* In Determining What Process Was Due

Petitioners do not dispute that the question of what process is due here requires application of the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Yet Petitioners would transform this context-specific balancing test into a wooden rule that government decisions which are in any way predictive need not entail the basic protections of notice, a meaningful opportunity to be heard, and a statement of reasons. The court below properly eschewed Ohio's mechanical approach, and instead considered all the factors this Court has identified as relevant in *Mathews*. It found that (a) the prisoners' interest in avoiding supermax confinement was "significant" and "weighty," (b) "past erroneous and haphazard placements at OSP" demonstrated the need for procedural protections, and (c) any burdens imposed on government by Revised Policy 111-07 "pass[ed] muster under *Mathews v. Eldridge*." Pet.App. 21a-23a.



#### A. First *Mathews* Factor: The Private Interest Of Prisoners In Avoiding Supermax Confinement Is Very Great

Ohio does not challenge the lower courts' findings that confinement at OSP constitutes an "atypical and significant hardship," *Sandin v. Conner*, 515 U.S. 472, 484 (1995), even compared to the segregated units at other prisons in the Ohio system. Yet, in direct contradiction to those very findings and their own concession, Ohio argues that the prisoners' interest in avoiding OSP is "not that high, as conditions there do not differ much from the highest-security conditions in the next-highest security prison," indeed that the interest of prisoners in staying out of OSP is "minimal." Pet.Br. at 31, 42.

The point of the *Sandin* test is precisely to separate those prison restraints that are part of the ordinary regime of prison life from those that force a prisoner to suffer "a dramatic departure from the basic conditions of [his] sentence." *Sandin*, 515 U.S. at 485. See *McKune v. Lile*, 536 U.S. 24, 41 (2002) (plurality) (*Sandin* test is thus designed to ensure that the prisoner's interest is weighty and not minimal).[3]

[3] Ohio misconstrues the court of appeals' conclusion that a "liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due than those which may have been found pre-*Sandin*." Pet.App. 22a n.12. The court of appeals was simply expressing the common sense proposition, reflected in the first prong of the *Mathews v. Eldridge* test, that the weightier is plaintiffs' liberty interest, the stronger the procedural protections that presumptively ought to be provided before plaintiffs can be deprived of that interest. Since *Sandin* requires a showing of "atypical and significant hardship" relative to ordinary prison life to support a liberty interest, 515 U.S. at 484, it is likely that any interest that meets that threshold will be one meriting substantial procedural protection.

The record here demonstrates that confinement at OSP "has immense consequences" for at least some prisoners. Pet.App. 61a. It is well known among corrections administrators and mental health professionals that severely isolated confinement for significant periods of time can be drastically damaging to prisoners' mental health.[4] Confinement in OSP represents the most severe punishment allowable in American corrections short of the death penalty.

Indeed, the confinement of many prisoners at OSP for almost four years, in the absence of any misconduct committed while at OSP, raises the question of whether those prisoners may have been effectively confined to OSP for the duration of their sentences. See *Hewitt v. Helms*, 459 U.S. at 477 n.9 (need for periodic review to ensure that administrative segregation not pretext for indefinite confinement); *United States v. Johnson*, 223 F.3d 665, 673 (7th Cir. 2000).

Further, confinement at OSP does not just have an "effect" on parole opportunities: it destroys them. Compare *Sandin*, 515 U.S. at 487 (nothing in Hawaii's code requires the parole board to deny parole), and *McKune*, 536 U.S. at 38 (prisoner's eligibility for parole unaffected). Where a person has been sentenced to a prison term that includes the possibility of parole at the discretion of the parole

[4] See *In re Medley*, 134 U.S. 160, 168 (1890) (striking down a statute retroactively imposing solitary confinement as an *ex post facto* law). See also Judge Posner's comment in *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988), *cert. den. sub nom. Lane v. Davenport*, 488 U.S. 908 (1988): "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage."



board, an administrative decision to remove that possibility and to eliminate the discretion of the parole board amounts to a change in the sentence imposed on the prisoner. See *Garner v. Jones*, 529 U.S. 244, 255-57 (2000) (rule which "in its operation" creates a significant risk of a longer period of incarceration for prisoners may well violate the Ex Post Facto Clause).

Ohio seeks to minimize the hardship of Level 5 placement at OSP by arguing that, as a practical matter, it is unlikely that inmates at OSP would qualify for parole. The factual record is to the contrary. Pet.App. 63a, citing Pl.Ex. DeJarnette-9, JA 184-88 (DeJarnette); 67a (Heard); 69a (Gardner). The automatic denial of parole eligibility particularly affects prisoners who are erroneously or arbitrarily incarcerated on Level 5 at OSP and have not committed the type of misconduct that would otherwise cause the Parole Board to deny them parole. *Id.* It is precisely those inmates for whom the district court's procedural requirements are most important.

So too, Ohio's claim that hundreds of inmates have volunteered to go to OSP is not in the record, is inaccurate, and seeks to entangle this Court in a separate controversy presently pending before the court of appeals. In fact, Ohio concedes that no prisoner has volunteered to go to Level 5 at OSP. The implementation of Revised Policy 111-07 resulted in a drastic reduction in Level 5 placements at OSP,[5] and as a result, Ohio adopted a plan, first proposed

[5] This reduction confirmed the finding of the district court that the "opening of the OSP has created too much capacity for the highest level of security," and that as a result "the defendants consider inmates for placement at the OSP who do not need its level of restrictions." Pet.App. 52a. Ohio's officials were thereby confronted with substantial

(Continued on following page)

in the prisoners' complaint, to convert OSP from a supermax prison to a maximum security prison with a supermax unit. It is to the new maximum security (Level 4) units, not to the supermax (Level 5) unit, that prisoners already on Level 4 "volunteered" to go. Ohio asserts that the Level 4, maximum security prisoners' stay at OSP is "short-term," that they can transfer back to the maximum security facility in Southern Ohio "at any time," and that the restrictions imposed on Level 4 prisoners are comparable to those at other "high security" facilities in the State. Defendants-Appellants' Reply Br. *Austin v. Wilkinson*, Case No. 03-3840 (*appeal pending*) at 4-5. A voluntary short-term transfer that can be revoked by the prisoner at any time is, of course, far different from the involuntary transfer of prisoners for the very long, indefinite duration involved in this appeal.

Finally, the liberty interest involved here is particularly weighty because incarceration at OSP is in some ways more burdensome than at other supermax prisons in the United States. All or almost all supermax prisons in the United States permit parole from supermax housing.[6]

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excess capacity at OSP, and converted most of OSP from a high maximum security, Level 5 prison to a maximum security, Level 4 facility. The issues of whether the new Level 4, maximum security units at OSP still constitute "atypical and significant hardship," and whether transfers were really voluntary, were disputed before the district court. *Austin v. Wilkinson*, Case No. 03-3840 (*appeal pending*).

[6] For a list of supermax facilities, see LIS, Inc., Supermax Housing: A Survey of Current Practice (1997), cited in Brief of *Amici Curiae* States of California *et al.* at 7. Respondents have sought and obtained responses from 26 of the approximately 30 state departments of corrections that operate supermax prisons. Of those 26 states, *only* Ohio has a rule automatically disqualifying supermax prisoners from eligibility for parole. One more state, Maine, has no parole.



Some supermax prisons hold prisoners for definite terms, and most were constructed with outdoor recreation facilities. See Brief of *Amici Curiae* States of California *et al.* at 8-9 (duration of confinement, possibility of parole); testimony of Jamie Fellner, JA 268 (Connecticut releases in 18 months, Colorado in 3 years); testimony of Chase Riveland, JA 402-03 (most supermax prisons have recreation areas outside the building). Transfer to Level 5 at OSP is at least as burdensome as a prisoner's transfer to a mental hospital that this Court has held to give rise to a liberty interest stemming from the Due Process Clause itself. *Vitek v. Jones*, 445 U.S. 480 (1980).

### B. Second *Mathews* Factor: A Serious Risk Of Erroneous Decisions Was Demonstrated At Trial, And Revised Policy 111-07 Significantly Enhances Careful And Accurate Decisionmaking

The district court held that *Mathews v. Eldridge* requires courts to consider, in addition to the interest of the individual and the interest of the state, "how great the risk is that the procedures used will come to an erroneous decision, and whether additional procedural protections would sufficiently reduce a risk of mistake." Pet.App. 102a.

#### 1. The Lower Courts Found A Pattern Of Haphazard Decisionmaking

In affirming the decision of the district court, the court of appeals emphasized the risk of erroneous decisionmaking in the procedures used by the Department. There had been "placement of inmates at OSP who did not

meet the high-maximum-security requirements, contrary to both corrections policy and constitutional norms," the court found. Pet.App. 3a.

> Some of the more troubling instances of this haphazard system occurred when the Bureau [of Classification] would, without stating its reasons, overrule the recommendations of both the classification committee and the warden and either place or maintain the placement of an inmate at OSP; when inmates who would otherwise be recommended for parole were ineligible because of a suspect OSP placement; when multiple jumps in security levels happened as a result of a single incident; when decisions were made with little factual support; and when decisions were based solely on the use or smuggling in of small amounts of drugs.

*Id.* at 4a. All of these cases were of prisoners who were still being housed at OSP at the time of trial.

Moreover, the court stressed, the Department did not challenge on appeal the district court's "specific findings concerning past erroneous and haphazard placements at OSP." Pet.App. 22a. Ohio ignores those substantial factual findings, presenting this case as if it were a facial challenge to the constitutionality of New Policy 111-07.

### a. Security Classification Based On Alleged Membership Or Leadership In A Prison Gang Is A Particularly Fertile Source Of Subjective And Arbitrary Classification Decisions

Ohio claims that these mistakes were made in the past and that New Policy 111-07 would have cured any



problems. Pet.Br. at 37. The district court found, to the contrary, that these arbitrary incarcerations were ongoing as of trial and that New Policy 111-07 was an insufficient remedy. Moreover, Ohio's brief offers a particularly vivid example of the continuing risk of erroneous decisionmaking under New Policy 111-07.

Ohio declares that New Policy 111-07 still permits a Security Threat Group Coordinator to identify a prisoner as a "gang leader," perhaps relying only on "rumor" or "reputation," and that the classification committee "may then take the Coordinator's judgment as a given, without conducting fact-finding regarding the inmate's gang membership." Pet.Br. at 35. The evidence at trial concerning prisoners Kevin Roe and Lahray Thompson demonstrated the risk of error resulting from reliance on such a procedure.

Kevin Roe was transferred to OSP in 1999 although he had been imprisoned for ten years with no violent or gang-related rule violations. Approximately 20 other prisoners were transferred from SOCF to OSP at the same time, although many "had no current misconduct and the Department never made out or proved a rule violation associated with gang membership." Pet.App. 74a.

Once at OSP, both in 2000 and 2001 Roe was recommended by the classification committee for transfer out of OSP, and was approved for transfer by the warden. Nevertheless, in both years Roe was retained at high maximum security classification by the Bureau of Classification because he was alleged to have been involved in conduct that resulted in disturbance at SOCF. Pet.App. 75a-76a, citing Pl.Ex. Roe-6 and -10, JA 227-32. The district court itself reviewed the evidence for Roe's retention *in camera*

and found in it "nothing to support" that assertion. Pet.App. 76a.

There was "even less evidence" for the placement and retention of prisoner Lahray Thompson, the court found. Pet.App. 77a. Thompson "was not given notice that he might be classified to high maximum or an opportunity to defend" against specific charges. *Id.* 78a.

> Justifying the process used to send Thompson to the OSP, the defendants first say that Thompson indicated affiliation with the Crips while in his early teens living in California. Second, the defendants presented evidence Thompson once had a tattoo often associated with the Crips. Third, the defendants offered evidence that Thompson once wrote a letter using the letter "b" in a fashion sometimes used by Crips members to disrespect rival gangs. Finally, the defendants produced a summary report that said Thompson was present at the time of the January 1999 fight [at SOCF involving members of antagonistic gangs]. The report did not further describe his role, if any, in the incident.

*Id.* 79a.

At OSP, Thompson (like Roe) was recommended for security classification reduction by the OSP committee in two successive years: indeed, the committee observed that "it appears he has been mixed up w/Inmate Capone . . . who is Id'ed as Crip Leader." Pl.Ex. Thompson-4, JA 234, offered and admitted Tr. 699. In his case, however, the warden approved the recommendation for security reduction in 2000 (only to be overruled by the Bureau of Classification), but disagreed with the same recommendation the next year "even though nothing about Thompson's



situation had changed." Pet.App. 79a n.19, citing Pl.Ex. Thompson-3 to -6, JA 233-38.

The facts found by the district court illustrate the commonly recognized risk of error in subjective decisionmaking that New Policy 111-07 permits. In a survey of supermax prison problems offered by Ohio as an exhibit at trial, Ohio's expert, Chase Riveland, stated:

> Attempting to use subjective criteria based on subjective information has led historically to unsatisfactory and possibly indefensible results. . . . Most prison systems have evolved over the last two decades from very subjective means of classifying inmates to relatively objective systems. This move toward objectivity has occurred mainly to avoid unbridled discretion. . . .

Chase Riveland, Supermax Prisons: Overview and General Considerations (1999), Def.Ex. R at 7-8, offered and received Tr. 1184. See also, illustrating risk of erroneous decisionmaking: *Koch v. Lewis*, 96 F.Supp.2d 949 (D.Ariz. 2000), 216 F.Supp.2d 994, 1003-04 (D.Ariz. 2001), *appeal dismissed sub nom. Koch v. Ryan*, 335 F.3d 993 (9th Cir. 2003) (prisoner released); *Wright v. Enomoto*, 462 F.Supp. 397, 399-402 (N.D.Cal. 1976), *summarily aff'd*, 434 U.S. 1052 (1978).

The obvious risk of error in these prisoners' cases is one that cries out for better procedural safeguards than they received, and, according to Ohio, would continue to receive under New Policy 111-07. At a minimum, Ohio should fully inform a prisoner of the charges and evidence against him (to the extent not threatening to prison security), afford him an opportunity to respond, and require that the ultimate decisionmaker justify and

explain his decision: none of which New Policy 111-07 requires. While conceivably prison officials might have reached the same conclusion about Roe and Thompson had they utilized such procedures, at least they would have had to consider the prisoner's version of the facts and been compelled to explain their own position.

### b. Central To The District Court's Concerns About Arbitrary Placement Was Systemic Evidence That The Bureau Of Classification Was Overruling Its Own Classification Committees And Wardens In Placing And Retaining Inmates At OSP

The Roe and Thompson cases are exceptional only in degree. In a one-year period prior to trial, 86 prisoners, more than 50% of the prisoners recommended by the classification committee for transfer out of OSP, were retained at OSP by the ultimate decisionmaker. Pet.App. 81a-82a. These recommendations were reversed without the prisoner ever having an opportunity to address the person who, in fact, made the decision on his reclassification. *Id.* 111a. Equally disturbing, the ultimate decisionmaker "frequently made decisions on an inmate's classification based on evidence and arguments never disclosed to the inmate." *Id.* 116a-117a.

The "risk of erroneous deprivation of rights is real when a decider of fact has not heard and observed the crucial witnesses." *United States v. Raddatz*, 447 U.S. 667, 687 (1980) (Powell, J., concurring in part, dissenting in part). In *Raddatz*, the Court recognized that when a district court rejects a magistrate's proposed findings on credibility without seeing and hearing the witnesses



whose credibility is in question, "serious questions" arise. *Id.*, 447 U.S. at 681 n.7. See also *id.* at 684 (Blackmun, J., concurring) (citing "practical concern for accurate results"). Here, the purpose of affording a prisoner the opportunity to explain why he is not a security risk is an inquiry similar to the credibility determinations at issue in *Raddatz*.

In other contexts, lower courts have required that the ultimate decisionmaker first provide notice and a hearing to an individual before reversing a favorable recommendation from a committee that has met with that person. *Mattox v. Disciplinary Panel of United States District Court*, 758 F.2d 1362, 1368-69 (10th Cir. 1985); *In re Berkan*, 648 F.2d 1386, 1390 (1st Cir. 1981); *Sheley v. Dugger*, 833 F.2d 1420, 1427 (11th Cir. 1987) (remanding to determine, *inter alia*, whether decisionmaker reversed the committee's recommendation of removal from close management without holding a hearing or explaining his reasons); *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990); *Ballard v. Commissioner of Internal Revenue*, 321 F.3d 1037, 1042 (11th Cir. 2003), *cert. granted*, 124 S.Ct. 2065 (2004) (serious concerns over propriety of process if Tax Court had reached a conclusion contrary to the Special Trial Judge without rehearing the evidence.)

The district court did not require the decisionmaker to provide a new hearing before reversing a favorable recommendation. Rather, because the persons who hear do not decide, and the person who decides does not hear from the prisoner, the decisionmaker should at least be required to tell the prisoner the reasons and evidence for the decision. As the court of appeals noted, "many of the procedures ordered by the district court are an attempt to reconcile an elaborate administrative appeals scheme

created by the ODRC Officials with the requirement that the inmate know the reason for any decision made about his fate. . . . " Pet.App. 24a.

### 2. The Procedural Requirements The District Court Ordered Were Designed To Reduce The Risk Of Erroneous Decisionmaking Found To Exist At OSP

Where the factual record demonstrates a substantial risk of erroneous decisionmaking, courts have imposed significant procedural requirements designed to reduce that risk. *M.L.B. v. S.L.J.*, 519 U.S. 102, 121-22 (1996) (only a transcript can reveal sufficiency of evidence); *Connecticut v. Doehr*, 501 U.S. 1, 14-16 (1991) (risk of error requires pre-deprivation hearing); *Furlong v. Shalala*, 238 F.3d 227, 237 (2d Cir. 2001) (high rate of reversal by administrative agency requires agency review of decisions by private carriers concerning Medicare reimbursement); *Hensley v. Wilson*, 850 F.2d 269, 282-83 (6th Cir. 1988) (risk of error entailed by informant's testimony supports contemporaneous recording of evidence).

The district court found that New Policy 111-07 does not require Ohio to inform a prisoner of all the reasons for placement at OSP, and therefore directed the Department to provide written notice 48 hours in advance of the hearing of "all the grounds believed to justify his placement at Level 5 and a summary of the evidence that the defendants will rely upon for the placement." Order of Mar. 26, 2002, Pet.App. 40a. Ohio concedes that, in contrast, New Policy 111-07 requires only a "brief summary of the event triggering the proceedings." Pet.Br. at 8.



Basic notions of due process require that prisoners have notice of all the reasons for placement so that they are afforded an opportunity to respond to all of those reasons. New Policy 111-07 would not pass muster even under *Hewitt v. Helms* which held that due process requires "some notice of the charges against him," not notice of some of the charges. 459 U.S. at 476.

The requirement that the Department confine its decisions to the reasons and summary of evidence listed in the notice is directly linked to one of the central problems the district court uncovered at trial: that the Central Office frequently overturned classification committee recommendations based on evidence and arguments never disclosed to the inmates. Limiting consideration to the reasons and evidence provided in the notice is carefully tailored to cure that deficiency. Ohio erroneously claims that the notice requirement "can act only to exclude relevant information," Pet.Br. at 38. Rather it functions to exclude information that the prisoner never knows about and has no opportunity to rebut.

The court's order that the final classification decision should set out all the grounds justifying the prisoner's placement, together with the facts and reasoning relied upon, addressed the same risk of erroneous decisionmaking. The Department's practice of considering factors and evidence not known to the prisoner, or even to the initial classification committee, caused a wide disparity between recommendations of the committee and decisions of the Bureau of Classification.

The requirement of meaningful notice, and of nonconclusory, more than boilerplate reasons, was also designed to cure the problem of cursory decisionmaking.

Detailed notice and, more importantly, reasoned decision-making induce the official to think through the issues and examine the facts more carefully. This is especially important here, where the district court "question[ed] how much consideration is given to the review of each inmate's reclassification recommendation" by busy officials with a multitude of other tasks. Pet.App. 60a-61a. "[A]'reasons' requirement promotes thought by the [decisionmaker] and compels him to cover the relevant points and eschew irrelevancies," and addresses "the need to assure careful administrative consideration." *Dunlop v. Bachowski*, 421 U.S. 560, 572 (1975). See also *Penson v. Ohio*, 488 U.S. 75, 81-82 n.4 (1988) (requirement to give reasons provides an inducement to make careful decisions and resist temptation to discharge an obligation in summary fashion); *Jackson v. Ward*, 458 F.Supp. 546, 565 (W.D.N.Y. 1978) (reason requirement promotes thought by the decision-maker, and protects against arbitrary and capricious decisions grounded upon impermissible or erroneous considerations); *Chavis v. Rowe*, 643 F.2d 1281, 1287 (7th Cir. 1981), *cert. den.*, 454 U.S. 907 (1981) (had hearing committee made detailed findings in first place, prisoner might not have been wrongfully placed in segregation for five months).

Kevin Roe's case illustrates the pressing need for the relief ordered by the courts below. Roe was sent to OSP without any notice of the reasons for the transfer nor an opportunity to challenge it.

> [T]he reclassification committee recommended raising his security classification from maximum to high maximum even though the board's behavior worksheet indicated he should be considered for a security level decrease. The committee's justification for its recommendation was that Roe was a longtime member of a gang and had participated in a racial disturbance over five years ago. . . . Roe was not given notice that these issues would be used to increase his security classification.



Pet.App. 72a-73a, citing Pl.Ex. Roe-2, JA 223. The Bureau of Classification's rationale in approving Roe's transfer to OSP was conclusory and boilerplate. In its entirety it reads: "Meets Criteria for High Max Placement." Pl.Ex. Roe-2, JA 226, offered and admitted Tr. 699-700.

Security Threat Group Coordinator Matthew Meyer testified at trial that Roe had been transferred to OSP for a different reason: because the Department believed that he was involved in gang disturbances in 1999 at SOCF. Pet.App. 74a-75a. The only specific event Meyer was able to cite was an incident in which Roe was hit on the head from behind with a spatula and did not fight back. *Id.* 73a-74a. The district court reviewed all of the Department's records on Roe and found "nothing to support [the] assertion he was involved in the 1999 incidents at the Southern Ohio Correctional Facility." *Id.* 76a.

Roe was never informed of exactly why he was sent to OSP. The Security Threat Group Coordinator communicated neither with Roe nor with the committees that recommended him for release, but only with the Bureau of Classification leadership. Pet.App. 74a. Indeed, the 2000 reclassification committee did not know the real reason for Roe's transfer to OSP, because it stated that "[i]t appears he was assigned to OSP based on history in 97." *Id.* 75a. Due process is meaningless when neither the prisoner nor even the committee that conducts the classification hearing

knows exactly why the inmate is being deprived of his liberty interest.

Ohio claims that the prisoners' concerns are "fully answered by the fact . . . that Ohio's inmates *already receive* full *Wolff* procedures in any RIB [Rules Infraction Board hearing] that might provide predicate facts for any later placement decision."[7] Pet.Br. at 39 (emphasis in original). The factual record makes clear that some prisoners, particularly those accused of being gang members or leaders (like Roe and Thompson), never received any disciplinary, RIB hearings on the predicate facts before transfer to OSP. Ohio transfers others for reasons that include both conduct subject to disciplinary proceedings, and conduct which is not so subject (e.g., "chronic inability to adjust," "impact on other inmates," New Policy 111-07, Pet.App. 131a).

Moreover, New Policy 111-07 does not require an independent finding by a Rules Infraction Board to initiate a classification review. Ohio claims that as a practical matter, officials generally initiate classification review only after an RIB finding or the prisoner's conviction for a new crime committed while the inmate is in prison, Pet.Br. at 7, but that "practice," if it exists, is nowhere in the record. Moreover, Ohio's claim that a prisoner can be transferred to Level 5 at OSP based solely on the unilateral and unchallengeable determination of the Security

[7] One court has recently found that Ohio's statement that the Department's disciplinary proceedings comport with *Wolff v. McDonnell*, 418 U.S. 539 (1974) is inaccurate: while the "written policies" may comply with the mandates of *Wolff*, the "unwritten policies" do not. *Williams v. Wilkinson*, 132 F.Supp.2d 601, 603 (S.D.Ohio 2001), *rev'd on other grounds*, 51 Fed.Appx. 553 (6th Cir. 2002) (no atypical and significant hardship under *Sandin*).



Threat Group Coordinator that he is a gang leader, Pet.Br. at 35, directly contradicts Ohio's assertion that it only transfers prisoners to OSP after the facts have been determined by an RIB or court hearing that complies with *Wolff* procedures.

Furthermore, far from basing classification decisions on the decisions of outside courts as Ohio claims, Pet.Br. at 7, the Department has routinely declined even to consider judicial proceedings that exonerated the prisoner. Prisoner Charles Austin was found Not Guilty of felonious assault, Pl.Ex. Austin-5, JA 159-64, but was retained at OSP regardless because the "verdict of an outside court case does not affect . . . the classification action which prompted your placement at OSP," Pl.Ex. Austin-8, JA 175-76. (Austin's exhibits were offered and admitted Tr. 694.) See to the same effect Pl.Ex. Gardner-1A, -1B, -1C, JA 192-96, Pl.Ex. Lane-1, Tolliver-9, JA 210-11, 241-43, offered and admitted Tr. 694-98.

Finally, even in those cases where the inmate's misconduct has been determined by an RIB that does follow *Wolff* procedures, a classification hearing is still necessary, because, just as in a parole revocation hearing, it is important "to know not only that some violation was committed but also to know accurately how many and how serious the violations were." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Both prison officials and the prisoner have a strong interest that inmates not be transferred to very costly and extraordinarily restrictive conditions "because of erroneous evaluation of the need" to do so, even when a violation has been established. *Id.* at 484. The evaluation of whether a prisoner requires transfer to OSP often involves complex factual questions that explain, mitigate or put

into context admitted violations even where the basic misconduct is not disputed.

For that reason, the United States government uses the very procedures at issue in this appeal for placement of prisoners in its control units, even though the purpose of the hearing is "not to go over the factual basis for prior actions which have been decided" and the Hearing Officer "may not consider an attempt to reverse or repeal a prior finding of a disciplinary violation." 28 C.F.R. §§ 541.43(b)(4)(i) and (ii). For similar reasons, this Court upheld the application of *Morrissey* due process procedures to probation revocation decisions, even though it recognized that the fact of misconduct was generally not in dispute because "[i]n most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him." *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

Due process protections simply are non-existent where the decisionmaker has unfettered discretion to deprive a person of his liberty based on the assertion of facts that cannot be challenged. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2647 (2004) (plurality opinion). Because New Policy 111-07 allows arbitrary and factually unsupported decisionmaking, the district court correctly recognized the need for an appropriate remedy.

Where, as here, there is specific evidence of widespread arbitrary and haphazard decisionmaking on the part of prison officials in the exercise of their discretion, courts must be accorded the equitable authority to fashion appropriate procedural remedies, as the district court did here. In the absence of a constitutional violation, courts ordinarily accord wide discretion to prison officials; but



where those officials have been found to have acted arbitrarily and in violation of due process rights, a court is authorized to provide appropriate relief. *Hutto v. Finney*, 437 U.S. 678 (1978).

### C. Third *Mathews* Factor: Revised Policy 111-07 Does Not Harm The State's Interest

#### 1. The Federal Government And Other State Governments Utilize Procedures To Place Prisoners In Their Most Restrictive Units Or Facilities Identical To Those Imposed By The District Court

Ohio claims that the procedures imposed in this case will lead to "bad decisions, which will impose significant potential harm on both prison staff and other inmates," Pet.Br. at 3. In support of this claim, Ohio states: "At least 32 States and the federal government operate supermax prisons, and to the best of our knowledge, not one provides procedures even close to what the courts below ordered here." Pet.Br. at 41.

Ohio could not be more mistaken. The federal government's experience with its control units, into which prisoners are placed by substantially the same procedures that the district court ordered here, and similar experiences of various state governments with supermax or high security facilities, directly contradict Ohio's claim.

The most restrictive non-punitive housing unit in the federal prison system is the Control Unit at ADX Florence.

Brief for the United States as *Amicus Curiae* at 2.[8] The nature of the decision to place a prisoner in the Florence Control Unit is the same as the decision to place a prisoner on Level 5 at OSP: an evaluation of the threat posed by the prisoner based on objective facts. The procedures used by Ohio for placement on Level 5 at OSP should be compared to the procedures used by the Bureau of Prisons for placement at its most restrictive setting, the ADX Florence Control Unit.

The federal placement procedure begins with a warden's recommendation after consideration of seven enumerated, objective factors. 28 C.F.R. § 541.41. The prisoner must then be given a notice that "will advise the inmate of the specific act(s) or other evidence which forms the basis for a recommendation that the inmate be transferred to a control unit. . . . " § 541.43(b)(1). At the hearing the prisoner must have an opportunity "to present documentary evidence and have witnesses appear." § 541.43(b)(4). Going beyond anything required by the courts below in this case, the federal Hearing Administrator "shall provide an inmate the service of a full-time staff member to represent the inmate, if the inmate so desires." § 541.43(b)(2). Finally, the Hearing Administrator is to prepare "a summary of

[8] The privileges and services available to prisoners in the Control Unit at ADX Florence are comparable or superior to those available to Level 5 prisoners at OSP. Bureau of Prisons, Control Unit Programs, PS 5212.07 at http://www.bop.gov/, pages 11 *et seq*. For example, federal control units at ADX Florence and Marion ordinarily provide study courses "for all levels; i.e., adult basic education, GED programs, correspondence courses, areas of special interest, and college courses," a "basic law library," and "the opportunity to receive a minimum of seven hours weekly recreation and exercise out of the cell." *Id.* Except for basic education and GED programs, none of these opportunities exist for prisoners in high maximum security (Level 5) at OSP.



the hearing and of all information presented upon which the decision is based," to "indicate the specific reasons for the decision, to include a description of the act, or series of acts, or evidence, on which the decision is based," and to provide this written information to the prisoner unless there is a specific security reason for withholding particular "limited information." § 541.44(a) and (b).

Thus the due process mandated by the Bureau of Prisons for assignment to a control unit at a federal prison is essentially identical to, and in one important respect greater than, the due process required by Revised Policy 111-07. The federal Bureau of Prisons has maintained these procedures for its most restrictive units for over 20 years since they were adopted in 1984. 49 Fed. Reg. 32991, Aug. 17, 1984. That fact alone refutes Ohio's contention that adoption of similar procedures in Ohio will undermine legitimate state interests.

Similarly, Ohio's statement that no state supermax uses procedures like those at issue here also is incorrect. In fact, there are other states which operate supermaximum or high security facilities or units utilizing procedures identical to or more elaborate than those ordered by the courts below.[9] (Some of these states, such as Colorado, are listed on the *amicus* "Brief of the States" filed in this case.)

[9] E.g., Alaska Department of Corrections Policy #735.03 E-H; Colorado Department of Corrections, Administrative Regulation No. 600-02 available at http://www.doc.state.co.us/admin_reg/PDFs/0600_02.pdf; Massachusetts Code of Regulations, Title 103, §§ 421.09-15; Michigan Administrative Code, R791.3301 Rule 301(b), R791.3315 Rule 315; New Jersey Administrative Code, Title 10A:5-2.4, 5-2.6; Wisconsin Administrative Code, Department of Corrections, § 308.04.

Colorado's procedures are illustrative. OSP was modeled after the Colorado State Penitentiary, Colorado's supermaximum prison which houses high-security risk offenders. Colorado Department of Corrections Regulation 600-02 requires that an inmate shall receive a notice prior to a hearing "setting forth the facts relied upon and reason(s) why the offender should be considered for placement" in the most restrictive custody level, including the "general substance of any confidential information." Regulation 600-02, IV F(1) and (3). A hearing is then held at which both the prisoner and classification committee can call witnesses. The Department has the "burden of proof to show that the offender should be or continue to be placed in" the most restrictive custody level (in Colorado termed "administrative segregation") and must meet a "*substantial* evidence standard." *Id.* at I(1) (emphasis in original). The classification committee then "shall prepare a written statement of the evidence relied upon, findings of fact, and the reasons for the decision," including the "general substance" of any evidence deemed "confidential." *Id.* at N(2). The procedures contemplate that a decision of the classification committee against placement of the inmate at the most restrictive custody level is final; however, where the decision is to place the offender in the most restrictive custody level it is reviewed by the administrative head and may be reversed. *Id.* at L(5), (6), O. The placement in the most restrictive custody level is thereafter reviewed every seven days for the first two months and every thirty days thereafter. *Id.* at Q. All of these procedures are either identical to, or significantly more protective than, those ordered by the district court here.



This federal and state experience suggests that objective criteria and the procedures in Revised Policy 111-07 aid, rather than hinder, the decisionmaking process.

Respondents do not claim that these federal and state government procedures, substantially identical to those ordered by the district court here, represent a constitutionally mandated minimal national standard for placement in all supermax prisons. First, supermax prisons come in all shapes and sizes. Second, other state systems may provide other procedural safeguards than those ordered by the district court below that reduce the risk of erroneous decisionmaking found to exist in Ohio. For example, a number of states can and do provide more frequent review of high security placements than Ohio's annual review: a few states set evidentiary thresholds for such placements; and others establish procedures to test the reliability of official identification of prisoners as "gang leaders."[10]

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[10] States that provide more frequent review of high security placement than does Ohio include:

– North Dakota (30 days), see North Dakota Dept. of Corrections Policies and Procedures Manual, Special Management Inmates, (V)(C)(2)(a);

– Nebraska (monthly), see Nebraska Department of Correctional Services, Administrative Regulation 201.05, IV(E)(6);

– Georgia (30 days), see Georgia Rules and Regulations, § 125-3-1-.03(5)(a);

– Pennsylvania (90 days), see Pennsylvania Department of Corrections, Administrative Custody Procedures, DC-ADM 802(VI)(E)(5);

– Nevada (30 days), see Nevada Dept. of Corrections, Administrative Regulation 507.02, 1.5.9;

– Iowa (31 days), see Iowa Dept. of Corrections, Policy IN-V-05, V(4);

(Continued on following page)

Respondents do not seek to deny states flexibility to adopt their own procedures to reduce the risk of erroneous decisionmaking. But lower federal courts must also have the flexibility to apply the *Mathews v. Eldridge* factors to remedy process that demonstrably leads to erroneous and haphazard decisionmaking. The experience of the federal government and states such as Colorado simply establishes that the procedures set forth by the district court in this case are not out of step with current penological

– Washington (6 months), see Washington Administrative Code, § 137-32-025(3); and,

– Arizona (180 days), see Arizona Dept. of Corrections, Department Order 801, 1.1.1.

States that define the threshold of evidence required for placement in high security include:

– Vermont (preponderance of evidence), see Vermont Dept. of Corrections, Directive No. 410.03, 4.3.8.1;

– Massachusetts (substantial evidence), see Massachusetts Code of Regulations, Title 103, § 421.15(1); and,

– Colorado (substantial evidence), see Colorado Dept. of Corrections, Administrative Regulation 600-02, IV(I)(1).

States with explicit procedures for use of evidence from confidential informants include:

– Arizona (to determine the reliability of the informant), see Arizona Dept. of Corrections, Department Order 801, 1.4.1.3;

– Nevada (procedure to test reliability of confidential informant), see Nevada Dept. of Corrections, Administrative Regulation 507.02, 1.5.5.1; and,

– New Jersey (prisoner must be provided with a summary of facts upon which the committee concluded that the informant was credible or his information reliable), see New Jersey Administrative Code, 10A:5-2.6(i) and (t).

In addition, according to LIS Inc., Supermax Housing: A Survey of Current Practice (1997) at 4, twenty-six states have "fixed systems" for determining the release date of prisoners in supermax confinement, while five do not.



practice and will not lead to the dire results that Ohio predicts.

### 2. Ohio's Objections Do Not Demonstrate That Revised Policy 111-07 Imposes Any Significant Burdens On The State

In the court of appeals, Ohio, both in its brief and at oral argument, did not point to any of the procedural requirements imposed by the district court "as being particularly burdensome," except for the notice provision. Pet.App. 24a. There, as here, Ohio relied primarily on its abstract, theoretical argument that the district court's modifications of Policy 111-07 are inconsistent with predictive decisions.

In its brief to this Court, Ohio does offer some concrete objections to the district court's orders, but all have a manufactured quality. For example, Ohio erroneously claims that the court ordered notice of "every possible piece of information" to be considered at hearing. Pet.Br. at 37. In fact, the court ordered the Department to provide "a *summary* of the evidence that the defendants will rely upon for the placement." Pet.App. 40a (emphasis added). Nor are "the officials' hands tied" if some new, critical or important information surfaces in the 48 hours between the provision of notice and the classification hearing or the relatively short period of time during which the warden and Bureau of Classification consider the placement. Pet.Br. at 37. In that hypothetical situation, the officials could simply amend the notice and issue a new one.

Ohio misreads the district court's order to require the disclosure of confidential information that could have deadly implications for informants. The court "recognizes

that prison officials have discretion regarding sensitive information," Pet.App. 116a, and in that light requires disclosure of "as much of the substance of the information as possible," *id.* 40a-41a. A fair reading of the court's orders requires only disclosure of information that can be provided without disclosing the identity or jeopardizing the safety of the confidential source. Ohio already requires similar disclosure in disciplinary proceedings. Ohio Administrative Rule 5120-9-08(G).

Ohio's claim that the requirement of a non-boilerplate statement of reasons will pile more work on an official the court already found overburdened fundamentally misunderstands the role of due process. The Department's responsibility is to determine how to manage and assign its staff and resources appropriately to ensure careful and nonarbitrary decisions. The court merely held that due process requires a showing that a careful decision was made before a person is placed or retained at OSP.

This Court has rejected absolute deference to government warnings of "dire impact" even where the government interest is normally accorded great deference. For "as critical as the government interest may be in detaining those who actually pose an immediate threat . . . history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 124 S.Ct. at 2647.

## II. This Case Is Dramatically Different From *Hewitt V. Helms*, And That Decision Does Not Govern

Ohio argues that this Court has established a "categorical" distinction between retrospective, fact-based



decisions, for which formal procedures are appropriate, and predictive, subjective judgments. Pet.Br. at 14, 22. According to this view, once a prison decision incorporates "subjective" and "predictive" elements, due process calls only for the informal procedures of *Hewitt v. Helms* regardless of the nature of the harm suffered by the prisoners, and the risk of arbitrary decisionmaking found here by the court and required to be weighed under *Mathews v. Eldridge*. Ohio says this case should be governed by the statement in *Hewitt* which held that due process was satisfied by "an informal, nonadversary review of the information supporting [the prisoner's] administrative confinement," 459 U.S. at 472, and that there is no reason to apply a different rule here. Ohio is wrong.

### A. Ohio's "Supermax" Confinement Is Far More Burdensome Than The Temporary Administrative Segregation At Issue In *Hewitt*

The prisoner in *Hewitt* was held in administrative segregation for approximately seven weeks during investigation of disciplinary and criminal charges against him. 459 U.S. at 463-65. *Hewitt* said that placement in administrative segregation was "not one of great consequence" because the prisoner was "merely transferred from one extremely restricted environment to an even more confined situation. Unlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation. . . . Finally, there is no indication that administrative segregation will have any significant effect on parole opportunities." 459 U.S. at 473; see *id.* at 476 n.8 (noting "the relatively insubstantial private interest at stake").

Level 5 at OSP is not simply Ohio's way of implementing the kind of confinement addressed in *Hewitt*. The court of appeals found that Ohio had a *Hewitt*-like administrative segregation procedure, with review every 30 days, completely separate from and much less draconian than supermax placement. Pet.App. 22a (administrative segregation is "a mechanism to ensure safety, one which does not require extensive process, and which, unlike OSP placement, is easily and swiftly reversible in the case of error"). Supermax confinement at OSP differs from the administrative segregation reviewed in *Hewitt* in nearly every respect.

The district court found that the hardship of incarceration, the duration of confinement, and the foreclosure of parole opportunities, make OSP significantly more restrictive than other Ohio prisons. Further, supermax confinement, unlike the segregation in *Hewitt*, does carry the "stigma of wrongdoing or misconduct." The district court found that placement on Level 5 at OSP is explicitly intended for "the most predatory and dangerous prisoners," or more colloquially "the worst of the worst." Pet.App. 49a, 52a.

Thus it is simply not true that Level 5 confinement at OSP is "not of great consequence."

### B. The Retrospective Component In Supermax Placement Decisions Is Far Stronger Than In A Probable Cause Hearing Preceding Investigation Of Alleged Misconduct

The nature of the decisionmaking process at issue here is materially distinct from that in *Hewitt*, and as a result the need for additional procedural safeguards is



much more substantial. Prisoner Helms was confined to administrative segregation "pending completion of the investigation of the disciplinary charges against him." 459 U.S. at 475. The closest analogue in the world outside prisons, the Court observed, was a hearing about the pretrial detention of a person charged with criminal acts. *Id.* *Hewitt* held that relatively informal administrative segregation procedures met due process standards because the matters to be decided would not have been "materially assisted by a detailed adversary proceeding." 459 U.S. at 474.

The *Hewitt* holding may have made practical sense in its context. In that case, prison officials were not yet sure what, if anything, the prisoner had done: they were trying to find out. They made the judgment that safety and security counseled keeping him in administrative segregation while awaiting information concerning his actions. Once they got this information, they issued a disciplinary charge, gave Helms a disciplinary hearing, and sent him to disciplinary segregation upon his conviction. 459 U.S. at 465. The regulation the officials relied on provided that prisoners accused of serious misconduct could be placed in administrative segregation "based upon [an] assessment of the situation and the need for control" pending further proceedings, or "where it has been determined that there is a threat of a serious disturbance or a serious threat to the individual or others." *Id.* at 470 n.6 (quoting regulations). The Court characterized such decisions as turning on "purely subjective evaluations and on predictions of future behavior," and held that informal process was appropriate for purposes of "a reasonably accurate assessment of probable cause." *Id.* at 474, 476.

Unlike *Hewitt*, which addressed temporary predictive judgments made in a situation of factual uncertainty, the decisions at issue here rest principally on factual determinations. The criteria for placement on Level 5 at OSP under New Policy 111-07 include assaultive and/or predatory behavior; the nature of the inmate's conviction; leadership roles in riots or disturbances; the possession of contraband; the identification of the inmate as a leader of a "security threat group" (prison gang); escape attempts; "an ability to compromise the integrity of [prison] staff"; knowing exposure of others to HIV or hepatitis; or a chronic inability to adjust to a lower security level. JA 20-22. These criteria refer to or depend on the existence of historical facts.

The court of appeals stressed that the Department's own regulations require it to establish certain "factual predicates, all of which are historical in nature," before a prisoner can be placed at OSP. Thus, the court reasoned, having

> set out a detailed and restricted list of reasons why inmates can be put at OSP, the ODRC cannot turn around and argue that the district court's order decreases their ability to rely on "rumor, reputation, and even more imponderable factors," for those factors are illegitimate under their own placement scheme.

Pet.App. 23a. The court reiterated that:

> In order to be placed at OSP, an inmate must fulfill one of those discrete, substantive historical predicates; the district court correctly required that ODRC Officials place an inmate on notice of what historical events will be used to demonstrate his fulfillment of one of those predicates.

*Id.* at 23a n.13.



### C. This Court Requires Careful Fact-Finding Pursuant To *Mathews v. Eldridge* Even In "Predictive" Decisions

Ohio's inflexible "one size fits all" approach is unsupported by this Court's decisions. For example, preventive detention decisions are based on a predictive judgment as to the dangerousness of the individual. Nonetheless, this Court has upheld such preventive detention "only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). In *United States v. Salerno*, 481 U.S. 739, 739-51 (1987), the Court explicitly found that certain formal fact-finding procedures, similar to those that Ohio objects to as ill-suited for predictive decisions, were "specifically designed to further the accuracy of the [bail] determination [of dangerousness]." The procedures required included the rights to proffer evidence, to cross-examine witnesses, and to receive from the decisionmaker "written findings of fact and a written statement of the reasons for a decision to detain." *Id.* at 752.

These cases also firmly refute Ohio's argument that "where the decision is predictive, the other *Mathews* factors, especially the private interest affected, carry very little weight, if any." Pet.Br. at 19. The duration of detention has often been emphasized by this Court as a critical factor in deciding what procedural protections must accompany preventive detention. *Zadvydas*, 533 U.S. at 691 (detention at issue is not limited, but potentially permanent); *Salerno*, 481 U.S. at 747 n.4; *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992), and 87-88 (O'Connor, J., concurring: case might be different if detention had different "duration").

The decisions involved here are much closer to the parole and probation revocation decisions analyzed in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), than to the "purely subjective evaluations" involved in *Hewitt*, 459 U.S. at 474. Despite the strong predictive element involved in *Morrissey* and *Gagnon*, the Court required due process protections analogous to those Ohio objects to here: (a) written notice of the claimed violations and the evidence; (b) right to present witnesses and documentary evidence; and (c) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. 408 U.S. at 489.

Perhaps the closest analogy to the OSP case is *Vitek v. Jones*, 445 U.S. 480 (1980), involving a decision to transfer a prisoner to a mental hospital. That decision is clearly not one based on a straightforward factual question of whether the prisoner committed the act alleged. Rather, the inquiry is "essentially medical" and "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." 445 U.S. at 495, quoting *Addington v. Texas*, 441 U.S. 418, 429 (1979). Ohio's theory would accord that transfer decision only the most informal, *Hewitt*-type protections because the decision is predictive and subjective. However, this Court in *Vitek* required the same due process protections that the district court ordered here, and more.[11] It did so because the inmate's private interest – avoiding involuntary transfer

[11] In addition to the basic requirements the district court ordered here – written notice of charges and evidence, right to have witnesses at hearing, and a reasoned decision – the *Vitek* Court also required that the inmate be afforded the opportunity to cross-examine witnesses, that legal counsel be provided if the inmate is poor, and that the decision-maker be independent. 445 U.S. at 494-95.



to a mental hospital – is not within the ordinary "range of conditions of confinement to which a prison sentence subjects an individual." *Id.* at 493.

Ohio relies heavily on *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), and *Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*, 442 U.S. 1 (1979), to support its argument that so long as the nature of the decision is predictive, the gravity of the private interest affected matters little. However, closer examination shows that the nature of the interest affected and the risk of erroneous decisionmaking were important factors in those decisions.

In *Horowitz* the Court found that a medical school's decision to dismiss a student for academic reasons did not violate due process where (a) the school "fully informed" the student of the faculty's dissatisfaction with her clinical progress, (b) the ultimate decision to dismiss the student "was careful and deliberate," and (c) she was afforded the opportunity to be examined by seven independent physicians in order to be absolutely certain that the decision was correct. 435 U.S. at 85. The Court's description of the process afforded makes clear the wide gulf between the "careful," "deliberate" and "informed" predictive decision-making upon which the Court relied in *Horowitz,* and the decisions based on "exceedingly weak evidence," made by a process with "great potential for error," which the district court found here. Pet.App. 80a, 102a. *Horowitz* contrasts sharply with this case, in which the ultimate decision-maker repeatedly rejected, without explanation, the unanimous recommendations of the classification committees appointed by prison officials. *Id.* 81a, 110a-111a.

Ohio also claims that *Horowitz* and *Goss v. Lopez*, 419 U.S. 565 (1975), taken together, demonstrate that the nature of the affected individual's interest is irrelevant, since Goss received more formal process for his 10-day suspension than Horowitz did for her expulsion. Ohio's argument fails adequately to understand the nature of the interests at issue in these cases. In *Goss*, the Court held that a 10-day suspension deprived a student of a not insubstantial protected property and liberty interest. 419 U.S. at 574-75. In *Horowitz*, the student clearly had no property interest, and the Court expressed doubt that she had any liberty interest because the medical school had not damaged her reputation by publicly disclosing the reasons for the dismissal. 435 U.S. at 83-84, citing *Bishop v. Wood*, 426 U.S. 341 (1976). The Court merely assumed, without deciding, that a liberty interest existed, en route to its decision about process. Had a clearer and weightier liberty interest been at issue, the process due would likely have been different, as the Court acknowledged in citing with approval *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975), in which a medical school not only dismissed a student for academic reasons but also publicized the reasons behind the dismissal, and the court held that a hearing was required. 435 U.S. at 86 n.2.

Similarly, in *Greenholtz* the Court found that the nature of the liberty interest was not substantial. The Court asserted that a "crucial distinction" existed between losing what one has and not getting what one wants. 442 U.S. at 9. To the Court, "the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process." *Id.* at 11. The Court parsed the state's statutory scheme to determine that a liberty



interest existed, but as in *Hewitt* the Court clearly believed that the interest was not of great consequence and held only that the inmates were "entitled to some measure of constitutional protection." *Id.* at 12. *Greenholtz* provides no support for Ohio's argument that the nature of the liberty interest at issue carries no weight in the determination of what process is due.

Thus Ohio's proposed principle that where a decision is predictive, the other *Mathews* factors, especially the private interest affected, carry very little weight, is unsupported by this Court's decisions. Rather, the cases reflect the common sense proposition that the nature of the hardship, particularly its duration, generally does matter and that the Court must carefully analyze the *Mathews* factors to determine what procedures are due in a particular situation.

## CONCLUSION

For the above-stated reasons, the decision of the court of appeals should be affirmed.

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**In The Supreme Court Of The United States**

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REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

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*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

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## TABLE OF CONTENTS

**Page**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

ARGUMENT ..... 3

A. This case is a facial challenge to Ohio's New Policy, and the only questions are whether that Policy is facially valid and whether the court-ordered changes are required to satisfy due process. ..... 3

B. Ohio's New Policy satisfies due process because the placement decisions at issue are predictive judgments, and the court-ordered modifications are not required. ..... 5

1. Under *Hewitt*, *Greenholtz*, and *Horowitz*, predictive decisions are categorically different from retrospective factfinding. ..... 6

2. Ohio's supermax decisions are properly classified as predictive judgments under the Court's precedents and our New Policy gives sufficient process for that type of decision. ..... 11

3. The court-ordered modifications do not add value, and they improperly burden Ohio ..... 14

**Page**

C. Ohio's interests here are strong, and the inmates' interests are lower than Respondents claim ..... 16

1. Ohio has a compelling interest in maintaining secure prisons without unnecessary burdens ..... 16

2. The inmates' interests in avoiding OSP placement are not that high ..... 16

CONCLUSION ..... 20



## TABLE OF AUTHORITIES

**Cases** **Page**

*Board of Curators v. Horowitz*,
435 U.S. 78 (1978) ..... *passim*

*Goss v. Lopez*,
419 U.S. 565 (1975) ..... 10

*Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,
435 U.S. 78 (1978) ..... *passim*

*Hamdi v. Rumsfeld*,
124 S. Ct. 2633 (2004) ..... 18

*Hewitt v. Helms*,
459 U.S. 460 (1983) ..... *passim*

*Mathews v. Eldridge*,
424 U.S. 319 (1976) ..... 5, 16, 17, 19

*Morrissey v. Brewer*,
408 U.S. 471 (1972) ..... 8, 9

*Sandin v. Conner*,
515 U.S. 472 (1995) ..... 16, 18

*United States v. Salerno*,
481 U.S. 667 (1980) ..... 18

*Vitek v. Jones*,
445 U.S. 480 (1980) ..... 17, 18

*Washington v. Harper*,
494 U.S. 210 (1994) ..... 18

**Page**

*Wolff v. McDonnell*,
418 U.S. 359 (1974) ..... 8

## INTRODUCTION

As Ohio showed in its opening brief, Ohio's procedures for assigning inmates to our highest security prison—the Ohio State Penitentiary (OSP), or "supermax"—give far more process than the Constitution requires. See generally Ohio Br. Ohio's Policy—that is, the "New Policy" that would have gone into effect if the courts below had not rewritten it—provides inmates notice and a right to be heard before a placement decision. That is more than adequate as these placement decisions are predictive judgments, and for such decisions the Constitution mandates only the "informal, nonadversary evidentiary review" described in *Hewitt v. Helms*, 459 U.S. 460, 476 (1983). Formalized factfinding is neither necessary nor appropriate in this context, because the focus of a prison-placement process is not to determine what an inmate has done in the past. Rather, the question is what placement is best for the future—not merely for the inmate, but for the system as a whole. That prospective, system-wide inquiry is not advanced by shifting the focus to retrospective factfinding. Indeed, such a shift undermines the placement process by subtly tilting its ultimate orientation, and that of the decisionmakers, toward factfinding, even if that is not the true purpose at hand.

In their brief, Respondents attempt to muddy this prospective/retrospective distinction, along with its implications for the due process analysis, by advancing two internally inconsistent arguments. First, Respondents claim (wrongly), "the decisions at issue here rest principally on historical determinations." Resp. Br. at 44. That is, they contend that these decisions are, in fact, retrospective. And Respondents rely on this to support their call for detailed fact-finding procedures. But at the same time, Respondents also complain that Ohio's New Policy would still allow placement decisions to be based on substantive criteria that are not reducible to historical facts, *id.* at 20–21, and that a security reclassification may occur without a specific

disciplinary violation as a predicate. *Id.* at 30. In other words, they complain that it is *not* sufficiently retrospective. Based on their first claim (i.e., that the decisions are retrospective) they insist that court-ordered factfinding tools are the better fit for the task at hand, while at the same time they try to change the nature of the task at hand (i.e., make the decisions more retrospectively focused) to fit the tools they seek to impose. The real answer is that Respondents are right when they assert that the placement process is not fully tied to discrete historical facts—and that is why they are wrong when they try to turn the process into a disciplinary-style proceeding.

Respondents err in other ways as well, as detailed below. They improperly, although understandably, seek to shift the focus to facts in the record regarding what happened *before* Ohio adopted the New Policy. But the New Policy, and the alleged need for the court-ordered modifications to it, is all that is at issue, making Ohio's pre-policy conduct irrelevant. Thus, Respondents are correct that Ohio is "presenting this case as if it were a facial challenge to the constitutionality of New Policy 111-07." Resp. Br. at 20. But we do so only because *it is*.

Respondents are also wrong to minimize Ohio's interests and to overstate the import of the inmates' interests. Ohio's interests include not only the strong interest in maintaining prison security, but also our interest in doing so without the unnecessary administrative burdens that the courts below imposed. And the inmate's interests carry little weight here because the Court's precedents assign less importance to private interests in the predictive-decision context, and because the inmate interests here are simply not that great to begin with. This case is not about whether inmates remain in prison or are released, or about whether free citizens are newly detained. This case is about whether inmates are housed in one prison or another. Even where



prison conditions differ "significantly" enough to trigger a State-created liberty interest against placement in a certain prison, that resulting interest is not that strong, and the process required is concomitantly minimal.

For all of these reasons, the decision below should be reversed, and Ohio should be free to implement its New Policy for supermax prison-placement decisions.

## ARGUMENT

### A. This case is a facial challenge to Ohio's New Policy, and the only questions are whether that Policy is facially valid and whether the court-ordered changes are required to satisfy due process.

Just as Respondents want each individual placement decision to look backward rather than forward, so, too, does their overall attack focus backward—stressing problems in the process back in 1998 and 1999—rather than focusing on the present dispute over whether the New Policy or the Court-ordered Policy should be used in the future. Not only do Respondents devote considerable space to elaborating Ohio's past problems, see Resp. Br. at 4–9, but most of their legal argument regarding the New Policy is based on the problems that occurred before the New Policy was developed, see, e.g, Resp. Br. at 19–24. But that approach is irrelevant to the question at hand: whether the New Policy provides adequate due process, and if not, whether the court-ordered changes went too far or were truly required to correct the problem.

Respondents curiously deny that this is a facial challenge to the New Policy, but they do not seem to explain what, in their view, the nature of the challenge is instead. That is, after repeating the litany of problems from the pre-New-Policy days, and stressing that Ohio did not challenge

on appeal the district court's findings in that regard, they conclude by charging that "Ohio ignores these substantial factual findings, presenting this case as if it were a facial challenge to the constitutionality of New Policy 111-07." Resp. Br. at 20.

Ohio admits that we treat this case as a facial challenge to the New Policy, because it is. It surely is not an as-applied challenge to the New Policy, as the New Policy has never been applied. Nor can this case proceed as a challenge to the Old Policy or to past actions before any policy existed, because any such challenge would be moot. Respondents did not seek damages for past problems, rather, they sought only a declaration that Ohio is not satisfying due process, and they sought injunctive relief forcing us to use different procedures in the future. Such claims can proceed only as a facial attack against the procedures that would exist without court intervention, i.e., Ohio's New Policy.

Thus, it is perfectly understandable that Ohio, after adopting a New Policy, did not invest resources into challenging on appeal the district court's factfinding about the prior problems. Those problems are no longer directly at issue. To be sure, Respondents and the courts below could argue, and do seem to argue, that the past is relevant to assessing the New Policy as an illustration of the kind of problems that, in their view, could still occur under the New Policy. That is, they could argue that the facial invalidity of the New Policy is indirectly supported by those facts. Although they are wrong on that score, for the reasons below, that approach is at least plausible. But Respondents offer no plausible basis for how the actual challenge here can be anything but a facial challenge to the New Policy.

Moreover, because Respondents allege that the New Policy is unconstitutional, and that the Court-ordered modifications are needed to cure that unconstitutionality, the



Court must *first* determine whether the New Policy is adequate, before reviewing the court-ordered modifications. This point is critical because the Sixth Circuit skipped this step, and Respondents lean in that direction as well. That is, the Sixth Circuit found that due process violations had occurred in the past, and then it *directly* jumped to assessing the merits of the court-ordered changes. Pet. App. 9a

But if the New Policy is adequate (and it is), federal courts have no warrant to offer "improvements" to an already constitutional policy. That is so even if the changes could be demonstrated to add value, or to add little burden, or to otherwise be "better" than Ohio's New Policy would be without those court-ordered changes. Here, as shown below, the court-ordered modifications are not an improvement. But equally important, the Court need not reach that point if it first finds, as it should, that the New Policy is facially constitutional.

### B. Ohio's New Policy satisfies due process because the placement decisions at issue are predictive judgments, and the court-ordered modifications are not required.

As Ohio's opening brief explained, this case involves essentially two analytical steps. First, a well-established legal framework shows how the *Mathews* analysis applies to predictive judgments such as prison-placement decisions. See Ohio Br. at 16–22; *Mathews v. Eldridge*, 424 U.S. 319 (1976) (outlining three-factor analysis for procedural due process); *Hewitt v. Helms*, 459 U.S. 460, 476 (1983) (holding that informal process is enough for predictive prison-placement decisions); see also *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979) (informal process for parole release decisions) and *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (informal process for predictive decision in academia). Under that

framework, as illustrated by cases such as *Hewitt*, *Greenholtz*, and *Horowitz*, due process does not require formalized factfinding when the ultimate function of the process is to render a predictive judgment, rather than to resolve a historical fact. Second, applying that framework here shows that Ohio's New Policy satisfies due process, for the function of that Policy is indeed to produce a predictive judgment about where a prisoner belongs, not to resolve whether something happened. To be sure, that predictive judgment involves review of historical facts (as predictive judgments often do), but the ultimate question is a predictive one, not a retrospective one.

Respondents offer several rejoinders, but none overcome our initial showing, on either the legal framework or its application here.

### 1. Under *Hewitt*, *Greenholtz*, and *Horowitz*, predictive decisions are categorically different from retrospective factfinding.

Respondents attempt to dispute the impact of *Hewitt*, *Greenholtz*, and *Horowitz*, but none of their purported distinctions withstand scrutiny.

1. In *Hewitt*, the Court explained that the decision to place a prisoner in administrative segregation for non-disciplinary reasons was a predictive judgment, so the decisionmaking process would not "have been materially assisted by a detailed adversarial proceeding." *Hewitt*, 459 U.S. at 474. Respondents claim that *Hewitt* does not govern here because, they say, Ohio's supermax placements are more burdensome than the temporary administrative segregation involved in *Hewitt*. Resp. Br. at 40–44. But even assuming arguendo that the burdens here are greater, that does not matter, because *Hewitt's* point was that the *nature* of a predictive judgment was such that adversarial



procedures simply do not add value. If retrospective factfinding procedures do not help to answer the question of where an inmate belongs for the next seven weeks, as in *Hewitt*, then such procedures do not become useful merely because a prospective placement is for twelve months, as here. Indeed, *Horowitz*, as discussed below, further confirms how the degree-of-private-interest does not change things when a predictive decision is at issue.

Respondents also try, and fail, to distinguish *Hewitt* by arguing that the decisions here are in fact more retrospective in nature, so that Ohio's decisions really are not as predictive as we say. Resp. Br. at 42–44. This argument is not only wrong, but it contradicts Respondents' other arguments in a way that undercuts their entire case. Respondents allege that the "decisions at issue here rest principally on factual determinations." Resp. Br. at 44. They approvingly cite the Sixth Circuit's absolutist view that Ohio's own New Policy allows us to place inmates at OSP *only if* we first establish certain "factual predicates, all of which are historical in nature." *Id.* (quoting Pet. App. 23a).

But in sharp contrast to their insistence that the process is already tied to historical predicates, Respondents also complain that the New Policy is *not* strictly limited to such predicates. They point out—rightly—that the New Policy allows a security-level reclassification to occur without a disciplinary violation as a trigger, Resp. Br. at 30, allows reclassification to be based on factors not tied to a specific disciplinary event, such as the inmate's "chronic inability to adjust," *id.*, and allows reclassification to be based on a subjective assessment of the existence or extent of gang involvement, *id.* at 20.

Respondents are wrong when they charge that the process is already tied to historical predicates, and they are right when they charge that the process is not so firmly tied

to such predicates after all. And it is precisely *because* the process is not historically-oriented, but is subjective and predictive, that we fall under *Hewitt*, and not under the framework for retrospective factfinding as established in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

2. *Greenholtz* confirms the categorical difference between predictive judgments and retrospective factfinding, and Respondents' attempts to distinguish that case also fail. *Greenholtz* involved parole decisions, which are predictive judgments about whether an inmate is ready to re-enter civil society, so the Court concluded that "[p]rocedures designed to elicit specific facts . . . are not necessarily appropriate." See Ohio Br. at 21; *Greenholtz*, 442 U.S. at 14. Respondents seek to distinguish *Greenholtz* on the idea that the liberty interest there "was not of great consequence." Resp. Br. at 49. But as Ohio explained, the interest in *outright release from prison* surely outweighs the interest here, regarding imprisonment at a higher or lower security level. See Ohio Br. at 21, 25.

To this, Respondents say that the critical difference is the inmate's baseline, or status quo, citing *Greenholtz*'s distinction between "losing what one has and not getting what one wants." Resp. Br. at 48 (citing *Greenholtz*, 442 U.S. at 9). To be sure, *Greenholtz* did distinguish *parole release* decisions, which involved a prisoner's hope of release, from *parole revocation* decisions, which involved a loss of liberty and reimprisonment. The former required less process, while the latter required more, under *Morrissey v. Brewer*, 408 U.S. 471 (1972).

But the Court's distinction between the two turned on more than whether the status change at issue would be good or bad for the prisoner, as the Court also stressed the dramatic difference in prison life versus liberty outside prison. Thus, the difference in direction—getting out of



prison or going back in—mattered so much because of the magnitude of the change along with the direction. Here, by contrast, even changes in the "negative" direction for the inmate are still within an imprisonment context.

Further, if Respondents are consistent about their distinction between an "upgrade" or a "downgrade" in an inmate's status, and if we apply that distinction here, then Respondents should concede to Ohio on the part of this case that deals with *retention* in OSP, as opposed to initial placement there. That is, the courts below imposed procedural burdens on Ohio not only regarding decisions to move an inmate to OSP, but also regarding the annual review decisions to retain an inmates in OSP or to reduce his security level. The latter is surely within *Greenholtz*, as it, too, involves an inmate's hope for improvement.

Finally, the Court in *Greenholtz* stressed that the "nature of the decision" there differed greatly from the parole-revocation decision at issue in *Morrissey*, because parole revocation *absolutely required* proof of a parole violation *before* proceeding to the question of suitability for revocation. *Greenholtz*, 442 U.S. at 9. And that predicate requirement "involve[d] a wholly retrospective factual question." *Id.* Here—as Respondents concede, and in indeed, complain—supermax placement does not require a disciplinary violation or any other historical factual predicate as an absolute prerequisite to reclassification at Level 5. See Resp. Br. at 30; Ohio Br. at 31–36.

3. Respondents' attempt to distinguish *Horowitz* is also flawed. As Ohio explained, *Horowitz*, which involved the dismissal of a medical student for academic reasons, establishes several principles that are relevant here. Ohio Br. at 17–20, 27–28, 33. For example, it shows that the level-of-private-interest does not matter as much in the predictive-decision context. *Id.* at 19–20 (citing *Horowitz*, 435 U.S. at

86 n.3). It also shows that a decision that is ultimately predictive is not treated like a retrospective factfinding even if the predictive decision is based largely upon historical facts. *Horowitz*, 435 U.S. at 89. And it shows that the Court defers to the administrative experts in the field. *Id.* at 89–90.

Respondents simply ignore the Court's own words in *Horowitz*, as they purport to distinguish *Horowitz* on the idea that the liberty interest involved—dismissal from medical school—was a slight one, and they argue "[h]ad a clearer and weightier interest been at issue, the process due would likely have been different." Resp. Br. at 48. Further, Respondents specifically contrast this allegedly slight interest in *Horowitz* with the "not insubstantial" interest present in *Goss v. Lopez*, 419 U.S. 565 (1975), which involved a ten-day suspension from high school. But Respondents' comparison of the "low" *Horowitz* interest and the "high" *Goss* interest fails entirely to address the Court's express recognition that the "deprivation to which [Horowitz] was subjected . . . was *more severe than*" the suspension at issue in *Goss*. *Horowitz*, 435 U.S. at 86 n.3 (emphasis added). And Respondents never even address the Court's detailed explanation of how *Horowitz* was categorically different from *Goss* because of the different *nature of the decision*.

Respondents also try to distinguish *Horowitz* by praising the careful job that the medical school did there in reviewing the medical student's file, as several officials were involved in the decision, and they informed the student of their concerns. Resp. Br. at 47. But that "careful and deliberate" process gave no more than Ohio's New Policy does. Here, too, several prison officials are involved in recommendations and layers of review, and the inmate receives a copy of the initial committee report and has a chance to respond. J.A. 22–23, 60, 61–65, 69. The medical school in *Horowitz* did not give the *Wolff*-type procedures that the student wanted, and Ohio here should not be forced



to use such procedures where, as in *Horowitz*, they do not fit the task at hand.

**2. Ohio's supermax decisions are properly classified as predictive judgments under the Court's precedents, and our New Policy gives sufficient process for that type of decision.**

As explained above, the decisions at issue here fit comfortably within the framework established by *Hewitt*, *Greenholtz*, and *Horowitz*, and Respondents' attempts to distinguish those cases fail. Aside from their misreading of those cases, Respondents' remaining attacks on Ohio's New Policy, tied mainly to disputes about how the Policy works—or should work, in their view—also miss the mark.

1. As noted above, Respondents repeatedly try to describe Ohio's process as *already based solely on historical predicates*, so that in their view, Ohio should be required to use the type of procedures that the Court has already said are appropriate for retrospective factfinding. Resp. Br. at 44. But again, that claim is entirely rebutted by Respondents' own protests that Ohio does *not* commit itself to reclassifying only after precise historical predicates, such as disciplinary violations, are established. *Id.* at 30. Instead, Ohio's New Policy allows us to reclassify prisoners for a variety of reasons, for the good of the system as a whole, and not just because prisoner X committed narrowly-defined act Y.

Respondents alternatively suggest that even if our Policy is not purely retrospectively-focused, it is mostly retrospective, or has a stronger "retrospective component." See Resp. Br. at 42, *id.* at 42–44. Further, they accuse Ohio of advancing a flawed view that would categorize a decision as predictive as long as the decision has any predictive or subjective elements. *Id.* at 41. That accusation has a kernel of truth, but it misses the mark. The question is not whether

the "components" of a decisionmaking process can be tallied up as mostly historical, or mostly predictive, with a 51% tilt either way deciding the matter. The issue is whether the *ultimate question* being asked by the process is a predictive judgment.

Often, a predictive judgment may turn almost entirely on historical components, or inputs, but the predictive process centers on an expert's evaluation of what those historical facts imply for the future. That was the case in *Horowitz*, where the ultimate question was whether the medical student should continue in her studies. The inputs there were largely, or perhaps even totally, historical, as the reviewers looked at her academic performance, her clinical performance, her attendance, and so forth. *Horowitz*, 435 U.S. at 80–81, 90. But the use of such historical facts as inputs did not transform the nature of the decision itself into a retrospective one.

Thus, the kernel of truth in Respondents' accusation is that we do say that a decision may be predictive even if the inputs are mostly retrospective. But that is not because of the mere presence of subjective elements as other inputs, but because of the nature of the ultimate question at issue. And more important, our approach has already been adopted by the Court. By contrast, Respondents' approach seems to require *Wolff*-type procedures whenever *any* retrospective element is involved, and the Court has rejected that approach.

2. To the extent that Respondents object to Ohio's use of factors that are not reducible to historical facts, that is a substantive, not procedural, attack, and it should be rejected. For example, Respondents complain that Ohio's New Policy is flawed because it would still allow Ohio to base a decision on rumor or reputation for gang membership, without a *Wolff*-type hearing on that issue. Resp. Br. at 21. But *Hewitt* specifically blessed the consideration of such factors. 459



U.S. at 474. Moreover, *Hewitt* also explained that prison officials may even consider factors not unique to the inmate at issue, such as the general atmosphere in the prisons, e.g., whether tensions have been rising lately. *Id.* Given the Court's approval of that substantive factor, it makes little sense to uniformly require procedures aimed at analyzing an individual inmate's behavior, as his record is not necessarily the controlling factor.

3. Respondents also claim that Ohio offers less process than the federal government and many States use in similar situations. Respondents' comparison to the federal process is misleading, because rather than comparing our supermax prison to the general populations of the federal facilities at Marion, Illinois (USP Marion), and Florence, Colorado (ADX Florence), Respondents use as a benchmark the even-higher-level control unit within the ADX Florence. To be sure, Respondents could dispute which is the better benchmark, but they merely assert that the federal Control Unit is comparable, without even acknowledging the point that the federal government gives *no process directly involving the inmate* before transferring an inmate to the Marion or Florence prisons. See Ohio Br. at 41; U.S. Br. at 2.

Because this litigation did not center on the federal facilities, the record here, not surprisingly, does not contain the detail needed to fully compare cell sizes, inmate privileges, and the like. But Ohio notes that the United States characterizes the Marion and Florence ADX prisons generally—and not just the Florence Control Unit—as "comparable, in some respects," to OSP. U.S. Br. at 1. And the United States also says that a decision here could have an adverse effect on their transfer decisions. *Id.* at 2. Further, the United States describes the conditions at the high-security and general population units at Florence and Marion as only "slightly less restrictive" than the conditions within the

Florence Control Unit. *Id.*; see Bureau of Prisons regarding ADX Florence, at http//www.bop.gov/locations/institutions/flm/index.jsp ("The Administrative Maximum (ADX) facility in Florence, Colorado, houses offenders requiring the *tightest controls*.") (emphasis added).

By contrast, Respondents offer, as the sole reason to compare the Control Unit, the fact that it represents the "highest" level in the federal system. But of course, that says nothing about the relative conditions anywhere, as the highest in one system could easily vary from the highest elsewhere. Finally, the federal decision to offer greater process regarding the Control Unit does not suggest that due process requires that, as prison systems frequently employ procedures for their own penological reasons, not merely because the Constitution forces them to.

Similarly, the use of more detailed procedures in some States does not imply that the Constitution requires it, as Respondents properly acknowledge. See Resp. Br. at 37. Respondents' citations do seem to indicate that perhaps our earlier description, that Ohio offers more procedures than other States, was overbroad. But at worst, Ohio is well within the range of State practices, as several States do offer less process, or none at all. See Amicus Br. of California, et al. at 10 ("Other states, like California, have more-freeform guidelines"; in California, "the choice is otherwise entirely left to the officials' discretion.").

### 3. The court-ordered modifications do not add value, and they improperly burden Ohio

Ohio's New Policy already satisfies due process. In addition, the court-ordered modifications do not add value to the process, and in fact, the modifications burden Ohio unnecessarily.



First, as already explained in our opening brief, the modifications burden us administratively and substantively, especially by limiting the appropriate use of confidential information. See Ohio Br. at 36–41. Respondents merely point out that the court's rules do not require us to provide all confidential information that we use, but to do so only to the extent consistent with concerns over an informant's safety. But that does not answer the point we raised regarding the difficulty of drawing that line, and being put to that choice without risking safety at the margins, or holding back from using the best information.

Second, the modifications, by ordering *Wolff*-type factfinding procedures, raise the possibility that the process will be subtly diverted into *substantively* becoming the type of purely retrospective decisionmaking that Respondents apparently want it to be. That is, even though we instruct our officials to look forward to what is best for the system, the procedural slant toward looking backward, at one inmate's record, may shift the whole process that way subtly and indirectly. Indeed, one of the primary reasons for shaping due process is to orient decisionmakers toward the desired result in terms of accuracy, proper focus, etc. But here, the process is not *meant* to reward or punish inmates, but procedures that better fit such a disciplinary mindset may shift the process toward that mindset. That would prevent us from truly making the type of forward-looking decisions that are required for effective prison management and for the security of other inmates.

### C. Ohio's interests here are strong, and the inmates' interests are lower than Respondents claim.

#### 1. Ohio has a compelling interest in maintaining secure prisons without unnecessary burdens.

Ohio's interest here is undeniably strong, for we need to maintain a safe and secure prison environment. As we work to keep our prisons safe, we need flexibility in sending inmates to OSP without undue barriers or delay. Indeed, Respondents do not dispute the strength of our interest, nor do they deny that conditions in our other prisons have improved since we opened OSP and removed problem inmates from those other prisons.. See Ohio Br. at 46 (citing J.A. 454–56 (Meyer Test.)). But as explained above, our ability to use this tool wisely is degraded by the court-ordered procedures.

#### 2. The inmates' interests in avoiding OSP placement are not that high.

As explained above and in our opening brief, the *Mathews* factor regarding the private interest carries less weight in the context of predictive judgments such as the OSP placement decisions at issue. And to the extent that such private interests do matter, the inmate interests against OSP placement are not nearly as great as Respondents suggest.

1. Respondents are simply wrong in insisting that our argument regarding the low interest here is "in direct contradiction to" the existence of a State-created liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). See Resp. Br. at 15. For support, Respondents merely repeat the Sixth Circuit's statement below that *Sandin*'s higher threshold for finding a State-created liberty interest must lead to a presumption of greater weight for the private interest in



conducting the *Mathews* balancing. *Id.* But as Ohio extensively discussed in our opening brief, see Ohio Br. at 23-30, that conclusion does not follow in the predictive-judgment context, and Respondents fail to respond to most or all of the points we raised there. In particular, Respondents offer nothing to rebut our reminder that this is, after all, a State-created liberty interest. So any rule that leads to burdensome *Wolff*-type procedures every time *Sandin* is triggered, with no room to ever use *Hewitt*-style process or anything between the two, gives us a strong incentive to avoid creating a liberty interest. Ohio Br. at 28–30

2. Respondents continue to ascribe artificial weight to the fact that Ohio bars Level-5 inmates from consideration for parole, but in truth, that rule had literally zero effect on most or all of the inmates at issue. As we explained—and Respondents do not dispute this—Ohio does not allow Level 4 inmates to be paroled, either, and about 90% of Ohio's Level 5 inmates (at the time of trial) came from Level 4. Ohio Br. at 44. Thus, the marginal change from 4 to 5 did not change their parole status at all. Further, even for the 10% or so who jumped two or more levels from Level 3 or below, the Level-5 parole barrier almost certainly had no net effect, either. That is so because, if those inmates had not been moved to Level 5, for whatever reason (including arguendo the idea that better procedures would have given them a different outcome), such inmates would almost surely have still been raised to Level 4 instead. And at that level, they, too, would have been ineligible for parole in their new status. And of course, all of this is against the backdrop that parole itself is not a protected liberty interest in Ohio, and indeed, we have since abolished it in Ohio. See *id.*

3. Respondents err in suggesting that the State-created liberty interest at issue here is comparable to an interest protected directly by the Due Process Clause, of its own force, under *Vitek v. Jones*, 445 U.S. 480 (1980). See Resp.

Br. at 19, 46. *Vitek*-type interests differ greatly in degree, in kind, and in doctrinal underpinnings, from those interests that States create under *Sandin*. Indeed, the Court expressly noted in *Sandin* that the interests that would henceforth be covered by *Sandin* did not rise to the level of *Vitek* interests. *Sandin*, 515 U.S. at 483–84. *Sandin* covers conditions that, although "significant and atypical" enough to warrant due process protection *when combined with State creation of a liberty interest* in the condition, do not alter the sentence "in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force" under *Vitek*. *Id.*

Respondents have never raised a *Vitek* claim, nor could succeed on one if they did. Their Sixth Circuit brief does not even cite *Vitek* or the similar case of *Washington v. Harper*, 494 U.S. 210 (1990). Further, *Hewitt*, in an additional holding that remains good law after *Sandin*, expressly held that transferring an inmate to a higher-security level did *not* trigger a *Vitek* claim. *Hewitt*, 459 U.S. at 460. That was so because "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Id.* Thus, the Court in *Hewitt* went on to find a State-created interest only after holding squarely that no *Vitek* interest existed. Consequently, when *Sandin* later altered *Hewitt* regarding the standard for *State-created* liberty interests, it did not alter *Hewitt's* foreclosure of a *Vitek* interest against transfers to more secure prisons.

4. The inmates' interests here also are not in any way comparable to the interests of those *not convicted* of a crime, and not imprisoned, but who might nevertheless be detained. Thus, Respondents' reliance on cases such as *United States v. Salerno*, 481 U.S. 667 (1980), Resp. Br. at 45, or *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), Resp. Br. at 40, are not helpful, whether on the strength-of-interest factor, or regarding the nature-of-decision factor, or for any purpose.



5. Finally, the due-process claims here are not substantive Eighth Amendment claims, so the issue here is what process is adequate to determine which inmates are transferred into undisputedly legal conditions—the issue is not whether such conditions are allowed at all. While that should go without saying, much of Respondents' argument, and that of some amici, implicitly sounds like an "Eighth Amendment lite" attack, aimed solely at condemning the conditions here independent of any connection to the procedural condition at issue. To be sure, the *Mathews* analysis does include consideration of the private interests at stake. But that is for the purpose of reaching better decisions regarding who is subject to the end result, accepting that the end result may be not to the party's liking. Procedural due process should not be used as a way to simply raise the cost to the States of using supermax facilities, and thus impeding their use at all.

In a similar vein, the suggestion that international standards have a role in this case is misplaced. See Amicus Br. of Amicus Human Rights Watch, et al. at 19–21. Whatever the role of international law should be, or not be, in substantive Eighth Amendment analysis regarding cruel and unusual punishment, it has no role where the issue is due process. Our American system is unique in its commitment to due process, which builds on an adversarial system that is foreign to the civil law tradition and many other traditions. Indeed, opening the door to international norms in the due-process arena would more likely decrease, rather than increase, protections in this field. Thus, the Court should decline the invitation to start down that path.

I mean, normally if he was here, it would be easier.

MS. O'BRIEN: That's not what I was going to ask. I'm sorry.

THE COURT: Okay.

BY MS. O'BRIEN:

Q. Is the best correctional policy or practice to be conservative in those decisions?

A. Well, conservative in the sense that the inmates that come to these places have already demonstrated a capacity to inflict harm or potential harm to inmates and staff, so that's—that's not the question.

The question is are they going to continue to do this or under what circumstances do you—do you allow them to be brought back into the general population.

It's conservative that they go through these places, they spend some time, they are observed, and when [1041] they are released they are not going just to the general population, they are going to another restricted area for more observation. And at that point if things look fine, then they are released.

So it is conservative in that you are dealing with a population that has a well-documented history of potential violence or actual violence against inmates, other inmates and other staff.

And so, yeah, you want to err on the side of caution here. You don't want to be overly liberal in this decision



because when it goes wrong, it goes wrong in a terrible way with terrible consequences for everyone.

So, yes, you have to be conservative.

MS. O'BRIEN: Thank you, Dr. Austin.

Mr. Lobel will probably have some questions.

**CROSS-EXAMINATION OF JAMES AUSTIN**

BY MR. LOBEL:

Q. Mr. Austin.

A. Yes.

Q. My name is Jules Lobel, I'm one of the attorneys for the plaintiffs, and I'm a fellow professor at the University of Pittsburgh law school.

THE COURT: Can you—I think you need to stand back a bit from the microphone.

Q. Mr. Austin, I just want to start by thanking you for [1042] your report. It helped clarify for me some of the issues in this case.

Let's start on Page 6 of your report where you say the—

THE COURT: Excuse me for a second.

(Pause).

THE COURT: Why don't you go ahead?

BY MR. LOBEL:

Q. You say that the ordinary time that most prisoners would stay at OSP would be two to three years, is that—

A. That—

Q. Right. So that a majority or a substantial majority of people should be out by two to three years?

A. Correct.

Q. There are, however, a growing number of inmates who will spend a considerably longer period of time which will greatly exceed the two to three year period?

A. Correct.

Q. Now, when you talk to defendants, did they confirm that there was such a group of inmates?

A. Yes.

Q. And did you get any sense of how large this group was?

A. No. But I think, if I recall correctly, they are talking anywhere from 20 to 50 maybe. It wasn't—it [1043] wasn't really pinpointed, but it's really something I wouldn't want to speculate too much.

It is an area that needs to be, I think, clarified.



Q. And in your opinion, looking at this population, what are you estimating?

You said a small number.

A. Right.

Q. What would be your general estimate, which I'm not going to hold you to specifically, but just as a general ballpark?

A. Well, ballpark, I would say maybe as low as 20, 25, maybe as many as 50.

Q. Okay. And do you think these people by and large will get out after four or five years or many, many more years?

A. Oh, I would say the major thing here, I've had some experience because looking at this, they will get out.

Q. Of OSP I'm talking about.

A. Yes, they will get out of OSP.

And again it gets back to each—each case and situation. I would suspect, you know, unless there was something that's really hanging over their heads, and there may be something in this case, and yet you have to acknowledge that I haven't studied this population so I'm [1044] kind of speculating, but I would say a good number of them would be gone within four or five years, probably double what the average stay is.

Q. And so—

A. Assuming, assuming now again, assuming that their behavior has been good, their mental health condition is good, they are expressing, I guess, some, you know, statement or reason to believe that they can make it in general population, they want to make it.

Now, they are not going to go to general population. As you know, they would go to another facility which is also restrictive, so that's the kind of progress that they would make, but off the top of my head, you know, I would say in four to five years most of them would be ready to go if they are doing the things that the department wants them to do.

Q. Okay. Now, you say that these should be—this relatively small group should be people who have participated in a really serious and harmful act.

A. Correct.

Q. We are now talking about a group—the whole inmate population at OSP is the worst of the worst, right, as sort of commonly known as?

So this group of people are, colloquially, we will call them the worst of the worst of the worst?

[1045] A. Well, yes. Yes, I would—I don't know if I would use those terms, but they have been involved in a very serious thing that really jeopardized the safety and well-being of inmates and staff, yes.

Q. Could you give us examples of the type of thing you are thinking of?

A. Inciting a riot, killing an officer, killing an inmate; you know, a history, a history of assaults on staff or



inmates even though death may not occur, but everytime this inmate comes out; a member of a Security Threat Group who is clearly the organizer of this group, and whenever this person is released a lot of bad things start happening wherever he or she may be.

Q. Not someone who is just identified as a leader, but there's got to be clearly some concrete evidence that this person in a particular prison leads to riots or leads to something bad happening?

A. Yeah, that type of person.

Q. Okay.

A. That's in that category.

Q. What about people who are in for drug offenses, would they fit into that category?

A. The conspiracy? Well, you know, one of the things—again again I can't say yes or no.

I mean, obviously someone who is trafficking [1046] in drugs or trying to bring drugs in, if you look at that in isolation, one would say, well, no one was hurt, but then that infusion of drugs, you know, can lead to situations where people are fighting and—over turf, and there may also be other things going on.

So in general, yeah, the drug thing is not as serious as, you know, obviously someone inciting a riot or killing someone or assaulting someone that really damages someone but, you know, you have to look at the context of that and does this person—I think what the department would be looking at, we have to be assured this person is not going to

do that any more, and we've got to feel we can control this person, and what's the best way to control this person.

But in general, yeah, that would be less serious than the ones I've mentioned.

Q. Now, we will return to that in a minute, but that Table 5 which is in your report which shows that there are 157 committees that recommend release and only 71 regional director recommendations for release.

A. Correct.

Q. And, therefore, over half of the committee recommendations are being vetoed somewhere up the line and less than half are actually being released.

A. Right.

[1047] Q. And you said in your conclusions on 5, on Page 13, Conclusion 5, "While it is understandable that the committee would have a higher recommendation for release, the differences noted here appear to be excessive."

Did you say that because a rate of over 50% where the committee recommends release and the higher-ups turn him down—

A. Right.

Q. —is not the usual case?

I mean, is that—what made you say it was excessive?

A. Well, there's two things going on there.



One is that the committee is waiting for the warden or higher-ups to be the fall people, or the committee has a different criteria than the warden has.

And the bottom line is this is producing confusion, and I would suspect some kind of anxiety and perhaps anger on the part of the inmate. Because if I was an inmate, I would say "Tell me what the game is that I got to do. If I want to get back and I want to sincerely get back out into the general population, you all tell me what I need to do. If it's reasonable, then I will adhere to the rules."

So if you have one release authority saying "Yeah, we do think you are ready to go," and another one [1048] cutting half of those, then that's not good.

Now, I don't know who was making the right decision. I didn't study that. I didn't study the actual decision-making process, but I think that the committee and the warden should be more in sync with each other. So either, from my way of thinking, the committee recommendations would go down or the warden's would go up or they might, you know, reach some kind of consensus.

But I think it's probably reflected I think—again the facility has opened up and they had the structure in place and they were probably finding their own way, I think, in terms of what is the proper reason or reasons to recommend release.

And I would just hope over time that you would see the disparity would narrow. And I'm not sure which way it would go.

But that was the reason for—that was the reason for my recommendation.

Q. Mr. Austin, I'm quite concerned about this what you call excessive difference, and I want to explore it a little more.

Let me present one hypothesis and tell me from your looking at this situation if you think it makes sense.

That the committee, using their form, is [1049] looking primarily at behavior of inmates at OSP. And as you noted, the behavior is pretty good and as we've heard testimony here, they take programs, some of them get GEDs and, therefore, the committee looking primarily at that is recommending a lot of people for release.

And that the higher-ups are using a different standard, your hypothesis number two, and their standard is based on the nature of the crime or things they know about the person, not really related to their behavior at OSP.

Does that—does that make sense as a possible explanation for what's going on here?

A. Yeah, that could be.

As you were talking, I think that also what the higher-ups are looking at, they are looking at the overall situation in the entire prison system.

I've seen this situation, if things are problematic elsewhere, they are going to be reluctant to be releasing people that have a history. So they are looking at the entire picture.

The committee is not looking—you know, I hear what you are saying about the committee. I want to point out



the committee looking primarily at the behavior, that may be the case. I don't think that's appropriate.

I think they should be looking at other things, too. Again the whole point is to be [1050] straightforward with the inmate so that he knows what the deal is.

So maybe the adjustment here is that the committee needs to understand behavior isn't the only decision here that is being weighted upon. You have to look at other factors.

Q And in my hypothesis, Mr. Austin, I didn't say "only." I said they were looking primarily at that.

A Right.

Q Wouldn't you agree, and I believe you testified in your direct testimony, that for most of the people, except for this 20 to 50 group, what you would look at primarily is their behavior?

And if their behavior was really good and they don't fall into this group of people whose conduct has been so severe in the past that we are not going to let their behavior get them out right away, you would want to release them?

A Yes, to the next phase.

Q. Yes. And the next phase, if they are on Level 3, the next phase is out of OSP, isn't that the way it goes?

A. I'm not sure about that. You would have to ask the department.

Q. Well, if they are on the highest level at OSP and they are ready for release, and it is determined that their

* * *

[1064] Q. And I'm asking you what would you—the question I have for you is what would you have the Court evaluate as to whether Mr. Roe fits into that category?

MS. O'BRIEN: Objection.

THE COURT: Overruled.

Go ahead and answer.

A. I, you know, that's a good question. It's a hard question because these are hard cases to evaluate, and I guess, you know, if you're the Department of Corrections, you're always looking on the side of, well, even if there's a low probability, there's a probability of something, he may strike again.

On the other hand, from your perspective he's done everything he can, we think his intentions are sincere, and so what you view as good intentions and what another department views as not necessarily good intentions is a subjective judgment call. And you have to look at these case-by-case.

I think at some point it becomes obvious that you've gone too far in restraining someone, but the person you talked about, he hasn't reached the three-year level yet, so I can't judge this particular person.

But that is the dilemma as to whether or not you trust the department to make reasonable decisions in these cases.

* * *



## TESTIMONY OF MATT MEYER

[1111] to Ohio State Penitentiary?

A. There was a group of us that made recommendations about who we felt were the leaders, who we felt were the soldiers carrying out these assaults, and who we felt were the main players within this, within this incident.

I don't make the decision who goes. We only made recommendations.

Q. And you make that recommendation to the chief of the Bureau of Classification, Bernie Ryznar?

A. I don't remember who we did that to in that particular day.

I remember being on the phone with the warden, with the regional director, with the Bureau of Classification. Who was first and all, I don't recall, but, I mean, we all met to discuss our—our plan.

Q. About how many got sent out around that time period?

A. I don't recall. 25?

I don't know.

Q. What was the effect on Lucasville afterwards?

A. It became calm.

We had very few to—I don't want to say none because I'm not absolutely positive of that, but very few assaults.

The prison was quiet. We had no problems with retaliation between the gangs. Our drug problem [1112] significantly decreased.

Additionally, during that time we were dealing with another Crip that had compromised one of our staff members and was trying to escape. Happened the exact same day that this incident was also going down.

This moving these leaders out greatly assisted the department and the institution in limiting the span of control of some of these leaders.

Q. Have you been consulted on decisions on whether to send Roe back to SOCF?

A. I have been asked by, I believe, the regional director if we have additional information or what—what rank, et cetera, we feel that Roe holds.

We have had several discussions about inmates, this group of inmates that was sent to the Ohio State Penitentiary in January of '99 to really make a conscientious effort to look at who we send back to Lucasville so that we don't send the same group of inmates that we sent out causing problems, right back to the same prison where they caused problems in the first place.

And how to do that best to manage and maintain a safe prison.



In doing that, we looked at who were the minor individuals or the lesser individuals involved in this incident, to those that were maybe medium of the way

* * *

## TESTIMONY OF STEPHEN HUFFMAN

[1138] A. Yes.

Q. Was there any kind of decision made concerning notice to the inmates about a transfer?

A. Repeat that? I'm sorry.

Q. Was at any time a decision made concerning notice to inmates about being transferred to OSP?

A. Well, it was discussed.

Due to the type of inmate that we had, I believe I had the discussion with Mr. Eric Dahlberg, who was the south regional director at that time.

We were concerned about security of transporting the inmates, so at that time we did not tell them where they were going as far as the transport.

I believe we got them up about—about 4:00 o'clock in the morning, which is normal for a transport of that length as far as going from Lucasville, which is close to Portsmouth, clear to Youngstown.

Q. You said you were concerned about security.

Was there anything in specifically, or just generally can you elaborate on your concerns, your security concerns?

A. Well, the type of inmates, I mean the individuals are doing long sentences.



We are concerned about escape attempts, them getting word to maybe folks on the street that would [1139] intercept the bus, and we're concerned of that with every transport, it's not just that kind of transport but every transport, but certainly with those type of inmates.

Q. About how many inmates were being transferred?

A. On the first busload?

Q. First busload.

A. To be honest, I can't tell you.

The bus, the bus capacity is 44, but I can't tell you if there was 44 that particular day or not.

Q. A larger number than a normal transport?

A. I mean, we have, you know, busloads of 44, but normally, yeah, most of them, they are not full.

Q. Okay. There's been some discussion about the north regional director being part of the retention process for inmates at the Ohio State Penitentiary.

At any time in your career have you been the north regional director?

A. Yes, ma'am.

Q. And when was that?

A. I believe I started in June of 2000 to June of 2001. 2001.

Q. So June of 2000 until June of 2001?

A. I believe that was—I believe that was the period.

Q. Do you know why the north regional director became part of the retention process?

[1140] A. Well, actually I think there was a couple of thoughts.

I think originally, originally the thought was I think actually being the tie breaker of, let's say the committee would recommend, the warden may recommend, then Mr. Ryznar and classification would maybe not agree and there would be a tie breaker.

But in turn, I believe the decision was made per Director Wilkinson that he wanted the regional director to have the final decision on all, not just on tie breakers.

Q. And so that was your role for a year?

A. Yes, ma'am. Yes, ma'am.

Q. So you were the final decision maker in the retention processes.

Did you have any trouble, do you think, looking at those files that came before you where the inmates were originally recommended for OSP by you as warden at SOCF?

A. No.

Q. Why not?



A. Well, there's several components that I will review when I make the decision.

Obviously I look at the committee's recommendations and the notes that they put on the form.

[1141] I'll look at the warden's as well, and then also Mr. Ryznar's.

But also when they are sent to my office or at that time, the microfiche is attached, the review form is attached, I look at all that information. You know, I—I felt I would make a good decision. I probably would be more—maybe more conservative than maybe the committee or even the warden or Mr. Ryznar.

I looked at all of them pretty much equally as far as weight simply because I think each of them looked at, as far as what their component that on the form was different—is different.

When the form got to me and the recommendations, I would look at it as department, not necessarily the committee may look at it, as the inmate at the institution, but I'm looking at possible ramifications throughout the department if the inmate is released at OSP.

Sometimes some of the information the committee may not have, STG information, those kind of things, possibly some of the information from the riot, which I have privileged information to.

Q. Is the number of beds available in maximum a concern of yours when you are making that determination?

A. I'm not sure I understand your question.

THE COURT: I think she's asking if there's [1142] political pressures because you built this new prison and is there political pressures to keep the prison open.

MS. O'BRIEN: Actually that wasn't, but that was going to be one.

THE WITNESS: Oh, which one do you want me to answer?

Q. Answer the Judge's first always.

A. Okay. That's probably a good idea.

No. I can answer that no. I mean, there's no pressure. I mean, no one has ever, when I was regional director, come to me and said "Hey, we've got 500 beds, keep them full," or something of that nature. No.

Q. Is there pressure on you not to send them back to Lucasville because Luke is full?

A. No.

MS. O'BRIEN: Your Honor, I was informed we have been doing this wrong the entire trial so let's see if I can do it the way I was supposed to.

THE COURT: I don't think. I think it's been working.

Q. I'm showing you what's marked as Plaintiff's Exhibit F.



Do you—this is the second page of the supervision review form.

Do you recognize it?

[1143] A. Yes.

Q. And is that a document that you received when you looked at retentions that come before you?

A. Yes.

Q. And you indicated you look at this document.

Do you look at the discretionary overrides?

A. Yes. Yes. Yes.

Q. And why do you look at those?

A. I guess for me I look at those as a guideline to where if I believe the information that has been given to me from—I'm trying—given to me by either the committee and the warden as well as Mr. Ryznar from classification, to see if the information given me, to me, still fits that criteria as far as the inmate.

And I can't remember all of them that are on there, but if they still fit that criteria, then I'm reluctant to release them.

And I'm more apt to—I would rather be more conservative and, you know, err in my judgment that, you know, when you release some of those type of inmates who are very, you know, have very serious crimes, I have to be very careful when making that decision.

So I'm probably going to be more conservative than maybe Mr. Ryznar or the warden or any of the committee.

* * *



[1171] Cross-examination.

**CROSS-EXAMINATION OF TERRY COLLINS**

BY MR. VASVARI:

Q. Hello, Mr. Collins.

We meet again. I'm Raymond Vasvari, I took your testimony in this room some months ago.

A. Good afternoon.

Q. I have just a few questions.

First, Ms. O'Brien asked you a number of questions about the distinction between conditions at various AC facilities around the state and OSP.

Is it correct that OSP is a general population prison?

A. OSP is a classification of high maximum where our AC blocks are considered special management, which is one of the reasons why I asked for the policy to be reviewed and had some concern about defining who actually went to which place.

Q. So AC is in a sense a special management or punishment status within the prisons where AC exists?

A. It's a special management. It's not a punishment status.

Q. What's the distinction?

A. Well, the fact is that AC was, prior to OSP, the place where you placed the most assaultive predatory-type

* * *

[1174] and determined whether or not they were working well together, would they have taken into account whether there ought to be AC status in the state?

A. I think they took that into account, but the decision was to go to a Level 4, Level 5 which we believe was a better system.

Q. Okay.

A. Both for people going into—from lesser security such as close into max, and max to Level 5.

Q. And Level 4 corresponds in the new policy to what was called administrative control in the old policy, correct?

A. No.

Q. Okay.

A. Level 4 refers to what we currently refer to as maximum security.

In Level 4 there's two other levels, an A and a B, level B being the most restrictive, Level A being the least restrictive.

Level 5 is what we now refer to as high max, and two levels there, B and A, B being the most severe, A being the least restrictive.



Q. So where does administrative control fit in all of this?

A. In fact there will not be such a thing as administrative control when this policy is in effect.

[1175] Q. But there will be a high max status that is distinct from some other status that occurs at the institutional level, correct?

A. That is correct.

Q. There will still be a managerial or segregation classification that exists at a specific institution where an inmate can be placed without being sent to OSP?

A. Well, each prison has a segregation unit which are completely separate under administrative regulation, under policy, under use, that are not near the ramifications of administrative control and/or high max.

Q. So that's not going to change?

A. There will still be security control, disciplinary control, and we are still having some discussion about the fact of the use of what we refer to as local control.

Q. And those categories of incarceration, Mr. Collins, those will all be philosophically institutionally distinct from high max status, won't they?

A. There—yes, most definitely different than high max facility.

Q. High max will be intended for a different sort of inmate?

A. Yes.

Q. Will have a different sort of restrictive environment?

[1176] A. Yes.

Q. Will be a more restrictive environment?

A. More restrictive than a disciplinary control unit?

Q. Yes, sir.

A. No.

Q. In fact, it's intended to be the most restrictive?

A. No.

Q. It's not intended to be the most restrictive?

A. OSP is in no way more restrictive than a disciplinary control cell.

Q. Do inmates in disciplinary control cells have access to outdoor recreation?

A. They have access to outdoor recreation one hour, five days a week. They have no TV, they have no property, they have no Walkman radio and they get little, if any, programming.



Q. How frequently is their status on that classification reviewed?

A. The longest they can do in a disciplinary control cell is 30 days.

Q. Okay. And when we see 30 days, we don't mean 30 days without review; we mean 30 days?

A. The most you can do in a disciplinary control cell at one time is 30 days.

Typically the arrangements there are anywhere

(10)

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**In The Supreme Court Of The United States**

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REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

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*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

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# BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Where state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in *Hewitt v. Helms*, 459 U.S. 460 (1983), satisfy the prisoner's due process rights?

## LIST OF PARTIES

The Petitioners are current or former officials of the Ohio Department of Rehabilitation and Correction (ODRC):

Reginald Wilkinson, Stephen Huffman, Todd Ishee, Bruce Martin, Deborah Nixon-Hughes, Cheryl Jorgenson-Martinez, Manish B. Joshi, Patrick F. Biggs, Audrey Sandor Nietzel and Matthew Meyer (collectively "Ohio").

The Respondents are a class of prisoners who have been or may be housed in the Ohio State Penitentiary, Ohio's only supermaximum-security prison. The class representatives are:

Charles E. Austin, Robert Baksi, Michael Benge, Alonzo L. Bonner, August Cassano, David E. Clark, James DeJarnette, Roy D. Donald, David Easley, Brian K. Eskridge, Keith Gardner, Roger Lee Hall, Frederick O. Harris, Jr., Daryl Heard, Edward O. Hodge, Orsino Iacovone, Kunta Kenyatta, Stacy Lane, James D. Mitchell, Emanuel B. Newell, John W. Perotti, Lamar Preston, Jason H. Robb, Kevin B. Roe, Richard Siggers, Eric Swofford, Lahray Thompson, Edward A. Tilley, and Mark Trawick.



## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

OPINIONS BELOW ..... 1

JURISDICTIONAL STATEMENT ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

INTRODUCTION ..... 2

STATEMENT OF THE CASE ..... 4

A. The purpose of supermax prisons and the process for determining which inmates should be housed there. ..... 4

B. Ohio's process for selecting inmates for placement in supermax. ..... 5

1. Background. ..... 5

2. Analyzing inmates for supermax placement. ..... 7

**Page**

3. Analyzing whether inmates are retained in supermax. ..... 9

C. The proceedings below. ..... 11

SUMMARY OF ARGUMENT ..... 14

ARGUMENT ..... 16

A. Due process does not require detailed formal procedures in situations involving predictive decisions. ..... 16

1. In predictive-decision cases, the nature of the decision is the most important *Mathews* factor ..... 16

2. Under *Hewitt*, prison-placement decisions are the type of predictive decision for which non-adversarial informal process is sufficient. ..... 20

3. *Sandin* did not change *Hewitt*'s application of *Mathews* to predictive decisions. ..... 23

B. Ohio's policy for placing inmates in supermax provided adequate due process for this type of predictive decision. ..... 30

1. Ohio's decisions to place prisoners in OSP are ill-suited to the *Wolff*-type procedures that the court below imposed. ..... 31



**Page**

a. OSP placement is a predictive, subjective, multivariate judgment, not a disciplinary punishment. ..... 31

b. The court-ordered modifications do not reduce the risk of error or otherwise add to the quality of the decisionmaking. ..... 36

2. The prisoners' interests here are minimal ..... 42

3. Ohio has a strong interest in maintaining prison security without unnecessary burdens. ..... 45

CONCLUSION ..... 49

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Austin v. Wilkinson*,
189 F. Supp. 2d 719 (N.D. Ohio 2002) ..... *passim*

*Austin v. Wilkinson*,
204 F. Supp. 2d 1024 (N.D. Ohio 2002) ..... 1, 11, 12

*Austin v. Wilkinson*,
372 F.3d 346 (6th Cir. 2004) ..... *passim*

*Board of Curators v. Horowitz*,
435 U.S. 78 (1978) ..... *passim*

*Clark v. Brewer*,
776 F.2d 226 (8th Cir. 1985) ..... 45

*Goss v. Lopez*,
419 U.S. 565 (1975) ..... 17, 20, 27

*Greenholtz v. Inmates of the Nebraska Penological and Correctional Complex*,
442 U.S. 1 (1979) ..... *passim*

*Hewitt v. Helms*,
459 U.S. 460 (1983) ..... *passim*

*Mathews v. Eldridge*,
424 U.S. 319 (1976) ..... *passim*

*Mims v. Shapp*,
744 F.2d 946 (3d Cir. 1984) ..... 45

*Morrissey v. Brewer*,
408 U.S. 471 (1972) ..... 16, 39



**Page**

*Sandin v. Conner*,
515 U.S. 472 (1995) ..... *passim*

*Shoats v. Horn*,
213 F.3d 140 (3d Cir. 2000) ..... 45

*Turner v. Safley*,
482 U.S. 78 (1987) ..... 40

*Vitek v. Jones*,
445 U.S. 480 (1980) ..... 29

*Washington v. Harper*,
494 U.S. 210 (1990) ..... 29

*Wolff v. McDonnell*,
418 U.S. 539 (1974) ..... *passim*

**Statutes and Regulations**

28 U.S.C. § 1254(1) ..... 1

Cal. Code Regs., tit. 15, § 3341.5(c)(1) ..... 41

Ohio Admin. Code § 5120-9-07 ..... 7, 39

**Other Authorities**

Chase Riveland, *Supermax Prisons: Overview and General Considerations*,
(U.S. Dep't of Justice, Nat'l Inst. of Corrs. 1999) ..... *passim*

*Supermax Housing: A Survey of Current Practice*,
(U.S. Dep't of Justice, Nat'l Inst. of Corrs. 1997) ..... 4

## OPINIONS BELOW

This case involves three relevant opinions: *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004), Pet. App. 1a–35a; *Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002) ("*Austin I*"), Pet. App. 47a–121a; and *Austin v. Wilkinson*, 204 F. Supp. 2d 1024 (N.D. Ohio 2002) ("*Austin II*"), Pet. App. 39a–46a.

## JURISDICTIONAL STATEMENT

The judgment and opinion below were entered June 10, 2004. No rehearing petition was filed below. On August, 27, 2004, this Court extended the time to file this petition until October 8, 2004. Order Extending Time to File, No. 04A174. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the Fourteenth Amendment to the United States Constitution and former ODRC Policy 111–07.

The Fourteenth Amendment provides, in relevant part, that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

## INTRODUCTION

This case is about choosing the right tool for an inherently difficult, and increasingly common, job—determining which inmates must be isolated in a "super-maximum security" prison to reduce danger to all who live or work in a State's prisons. That sensitive task requires "[d]iagnoses, prediction, risk assessment, and identification of causal factors" that "often defy objective criteria." Chase Riveland, *Supermax Prisons: Overview and General Considerations* 9 (U.S. Dep't of Justice, Nat'l Inst. of Corrs. 1999), available at http://www.nicic.org/pubs/1999/014937.pdf (Defendants' Ex. R). The question here is whether the Due Process Clause was satisfied by the procedures that Ohio established for deciding which prisoners belong in our highest-security prison, the Ohio State Penitentiary (OSP). The answer is yes, as Ohio's procedures more than satisfied the constitutional minimum here, and the courts below were wrong to saddle Ohio with additional procedural burdens.

Ohio's process, which gives inmates notice and a right to be heard before a placement decision, is more than adequate because the decisions at issue are the type of predictive, multivariate decisions that this Court has discussed in *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); and *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). Such decisions, the Court has explained, are, because of their nature, "singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9. The Court thus requires only "an informal, nonadversary evidentiary review" involving notice and some opportunity for an affected person to present his views. *Id.* at 476. Ohio gives that and more.

But the decision below demanded much more, requiring a qualitatively different type of process, the type required for



disciplinary hearings by *Wolff v. McDonnell*, 418 U.S. 539 (1974). Because *Wolff*-type process is designed for retrospective determination of specific facts (whether an inmate violated prison rules), it requires very different procedures: detailed advance notice of specific charges, the right to call witnesses, and written findings stating the evidence and reasoning underlying the decision.

Such *Wolff*-type procedures do not add any value or improve the quality of the decisionmaking here, where the substantive decision in question is predictive, not retrospective, and involves subjective judgment based on many factors. *Wolff* process makes sense where prison officials are punishing prisoners for past wrongdoing, but supermax placement is about safe and effective prison management, not punishment. "Wardens [] invoke this procedure as a *preventative* . . . measure." Riveland, *supra*, at 8–9 (emphasis added).

Forcing prison officials to provide *Wolff*-type factfinding procedures, even though the officials are making a predictive assessment, simply does not make sense. *Wolff*'s retrospectively focused procedures are a poor fit for the task at hand. Bad decisions result, and those decisions in turn impose significant potential harm on both prison staff and other inmates.

As the Plaintiffs' leadoff witness acknowledged: "Human rights concerns cut both ways . . . . We are concerned about the rights of inmates to be safe and free from assaults or being preyed upon by dangerous inmates." Trial Tr. Vol. 1, at 81 (Fellner Testimony ("Test.")). The decision below hinders Ohio's ability to address that harm. Ohio therefore asks the Court to reverse that decision, and to restore our ability to provide a safer and more secure prison environment.

## STATEMENT OF THE CASE

Three sets of facts are relevant here: the purpose of supermax prisons and the nature of the decisions about which inmates should be housed there, the system controlling Ohio's supermax placements, and the proceedings below.

### A. The purpose of supermax prisons and the process for determining which inmates should be housed there.

Supermax prisons are intended to concentrate the most dangerous inmates within a jurisdiction in a single facility in order to make the entire system safer. Such facilities were developed to deal with a "perceived 'toughening' of the inmate population, increased gang activity [and] the difficulty of maintaining order in severely overcrowded prisons." Riveland, *supra*, at 1; accord *Supermax Housing: A Survey of Current Practice* 3 (U.S. Dep't of Justice, Nat'l Inst. of Corrs. 1997), available at http://www.nicic.org/pubs/1997/013722.pdf .

Although typically only those inmates who have engaged in serious misconduct are placed in such facilities, supermax placement has a preventive rather than punitive goal: averting future problems by segregating disruptive inmates. J.A. 310–11, 318–20 (Ishee Test.); *id.* at 464–65 (Collins Test.). "Wardens [] invoke this procedure as a preventative . . . measure." Riveland, *supra*, at 8–9. It is "a non-disciplinary status—that is, the placement is not a penalty with a determinate time affixed to it, but is based on a pattern or history of dangerousness or unconfirmed but reliable evidence of pending disruption." *Id.* at 8.

Because of that prophylactic function, decisions about which inmates are housed there are predictive and multivariate. The placement decisions are not based on any



one fact or group of facts because "[d]iagnosis, prediction, risk assessment, and identification of causal factors to violent acting out often defy objective criteria." Riveland, *supra*, at 9. Decisionmakers therefore "need to look at the inmate's entire profile," J.A. 269–70 (Fellner Test.); see also *id.* at 437–39, 450–52 (Dr. Austin Test.).

Further, an individual inmate's "behavior isn't the only decision here that is being weigh[]ed . . . [y]ou have to look at other factors." J.A. 452 (Dr. Austin Test.). In particular, prison officials must consider "the overall situation in the entire prison system . . . if things are problematic elsewhere, [prison officials] are going to be reluctant to be releasing people that have a history. So they are looking at the entire picture." J.A. 451 (Dr. Austin Test.); see also *id.* at 383–84 (Riveland Test.), 460–61 (Huffman Test.).

Thus, experts agree that, given the nature of the decision to be made and the range of data involved, supermax placements cannot be made through the simple application of objective criteria. Although objective factors are part of that process, the decision is primarily intuitive. "[U]ltimately, it's going to be a subjective judgment by a person or an office . . . based on their experience and how they feel about the risk . . . that judgment call is necessarily subjective." J.A. 433–34 (Dr. Austin Test.); see also J.A. 267–78 (Fellner Test.), 432, 441–42 (Dr. Austin Test.).

### B. Ohio's process for selecting inmates for placement in supermax.

#### 1. Background.

Ohio's only supermax prison, the Ohio State Penitentiary (OSP), opened in 1998. At first, the process for determining which inmates were housed there was less than

consistent. Ohio carefully analyzed the matter, and in 1999, Ohio issued the first version of Policy 111-07. That document put forth general criteria for placement at OSP and set procedures for deciding which inmates should be placed and kept there. Defendants' Ex. B (Trial Tr. Vol. 4 at 1181–82).

Ohio was still not satisfied with its procedures and, before this case was filed, began to further study the matter. Prison officials formed an internal committee and retained a national expert in evaluating prisoners' security risks. That resulted in a second iteration of Policy 111-07, issued in January of 2002 (the "Policy" or "New Policy"). J.A. 15–69. This New Policy provided more guidance to all involved in the classification process regarding what factors should be considered in weighing whether a particular inmate belongs in supermax. The Policy does not establish a formula or include any quantitative point system; rather, it calls for the officials to exercise judgment regarding the totality of the several prescribed factors. Moreover—and of particular importance here—the Policy significantly increased the process given when deciding whether a prisoner should be placed or retained in supermax status.

Ohio scheduled the New Policy to be effective on March 1, 2002, but the district court preempted that plan when it found the New Policy to be unconstitutional. The district court ordered several modifications to the New Policy, resulting in a version effective, pursuant to court order, on May 22, 2002 (the "Court-ordered Policy"). Petitioners, Ohio prison officials, contend that the court-ordered modifications were unnecessary, as, in our view, the New Policy already exceeded constitutional requirements. Consequently, this case concerns the constitutionality of the New Policy. The procedures described below are those that the New Policy provided, or, more precisely, that the New



Policy would have provided, had it gone into effect (and that the Policy will provide if this Court reverses).

**2. Analyzing inmates for supermax placement.**

Every Ohio prisoner is assigned a security classification from Level 1 (lowest risk) to Level 5 (highest risk, or supermax). The level represents a predictive assessment of the risk the prisoner presents, and it is based on several factors, including his offense, previous record and gang affiliations. A prisoner receives an initial classification upon entering prison, but that is subject to change at any point during his incarceration. Prisoners classified at Level 1 through Level 4 are housed in prisons throughout Ohio. Inmates classified at Level 5, however, are automatically transferred to OSP. See ODRC Policy 53-CLS-01 § V, available at http://156.63.250.98; Policy § VI(B)–(D), J.A. 18–24.

Under the Policy, any of several listed prison officials may initiate a classification review for any reason. See Policy, § VI(C), J.A. 20. However, as a practical matter, officials initiate such a review only after one of two events: (1) an independent finding, in proceedings before the Rules Infraction Board that comply with *Wolff*, that the inmate has engaged in disruptive conduct, see Ohio Admin. Code § 5120-9-07, or (2) the inmate's conviction for a new crime committed while in prison. In addition, the Policy provides that an inmate may be classified as Level 5 at "reception," when he first enters the prison system after his conviction. Policy § VI(A), J.A. 17–18. In all cases, regardless of why the classification review was initiated, the process for analyzing a proposed placement is the same. Policy § VI(C), J.A. 20–24.

While events such as a disciplinary finding or a criminal conviction are potential triggers for classification, neither event automatically results in Level 5 placement or even consideration for such a placement. Instead, such consideration occurs only if one of the listed officials believes that the underlying conduct demonstrates an increased risk of future disruption, and thus a need to consider reclassification. If so, he or she initiates a classification review, which stands apart from any prior disciplinary proceeding.

The classification review begins with a written report reviewing the inmate's characteristics and conduct more broadly (i.e., age, time remaining on sentence, escape attempts, gang affiliations, history of violence in prison, etc.). Officials then conduct a more detailed examination of the risk presented by the prisoner's presence in his current security level, following the factors outlined in the Policy and further detailed in accompanying forms. Policy § VI(C), J.A. 20–22; Security Designation (Long Form), J.A. 38–45.

A three-member classification committee then holds a hearing to review the matter. The inmate is notified at least 48 hours before the hearing, and the notice includes a brief summary of the event triggering the proceedings. Policy § VI(C), J.A. 22; Notice of Hearing Form, J.A. 58–59. The Policy provides for the inmate to appear, if he wishes, and to submit both oral and written statements. *Id.*

The committee assesses the inmate's propensity for disruptive behavior, and it recommends whether the inmate should be classified at Level 5. The committee sends that recommendation to the warden of the prison where the inmate is housed, along with a report. That report includes a narrative description of "the nature of the threat the inmate presents and the committee's reasons for the recommendation." J.A. 64. The inmate is given a copy of



the recommendation and may object in writing. Policy § VI(C), J.A. 23; Summary of Inmate's Information Form, J.A. 69; Summary of Staff's Information Form, J.A. 60; Classification Committee Report, J.A. 61–65.

The Warden reviews the recommendation and decides whether he agrees. If the Warden disagrees with a Level 5 placement recommendation, he vetoes it and the process ends there. If he agrees that Level 5 placement is appropriate, he forwards the matter to the Bureau of Classification for final decision. The inmate may object to a warden's approval of Level 5 placement. If the Bureau approves the placement, the prisoner is reclassified at Level 5 and transferred to OSP. Policy § VI(C), J.A. 23.

The inmate receives a final, fail-safe evaluation after he arrives at OSP. That review usually occurs within five days of his arrival and must occur within thirty days. J.A. 329 (Ishee Test.); Policy § VI(E), J.A. 25. At that time, OSP staff review his file and evaluate the propriety of the placement decision, and report to the OSP Warden. If the OSP Warden determines that the inmate does not belong in OSP, he sends a report with that recommendation to the Bureau of Classification, and the Bureau decides whether the inmate should stay at OSP. Policy § VI(E), J.A. 24–25. Such fail-safe reviews by the OSP Warden are not perfunctory, as some inmates have had their Level 5 classifications reduced as a result of the OSP Warden's reconsideration. J.A. 328–30 (Ishee Test.).

### 3. Analyzing whether inmates are retained in supermax.

Ohio also provides significant process when deciding whether a prisoner will stay in supermax. An annual review considers a variety of factors relevant to a predictive

assessment of the risk that might be incurred if the inmate's classification is reduced. Those factors include the inmate's underlying criminal offense, the time left on his sentence, the reasons for supermax placement, the time since placement, his conduct at OSP, whether he has taken advantage of programming, and his interaction with staff. Policy § VI(I), J.A. 30–33; Privilege/Security Level Review Form, J.A. 66–69.

An inmate receives 48 hours' written notice of a retention hearing, just as he does for an initial Level 5 placement proceeding. Again, a three-member classification committee considers the matter. The inmate may, if he wishes, appear before the committee and give oral and written statements. Policy § VI(I), J.A. 30–31; Notice of Hearing Form, J.A. 58.

The committee sends its recommendation to the OSP Warden. The inmate receives a copy of that recommendation and may file objections. The Warden then accepts or rejects the recommendation and passes his decision to the Bureau of Classification for further review. The inmate may also object to the Warden's action, and the matter is submitted to the Bureau for final disposition. Policy § VI(I), J.A. 32–33; Privilege/Security Level Review Form, J.A. 66–69.

In addition to this annual review of Level 5 status, the inmate also receives more frequent reviews regarding his privilege level within Level 5. Inmates are classified as 5A or 5B, and while all Level 5 inmates are at OSP, the 5A inmates receive greater privileges, such as more phone calls, longer visits, broader TV privileges, shared recreation with another inmate, and the like. Level 5B inmates have their privilege levels reviewed every three months, and Level 5A inmates are reviewed every six months. (The difference in frequency favors inmates, as the lower-level 5Bs have more



frequent opportunities to move up.) The privilege-level reviews involve the same factors as the security-level retention proceedings, so an inmate's privilege-level review provides significant feedback on the inmate's progress toward eventual reduction from Level 5 to Level 4. Compare Policy § VI (H), with § VI(I).

### C. The proceedings below.

Respondents are a class of prisoners who challenged the procedures for deciding which inmates are placed and kept in supermax status. They claimed that they had a liberty interest in staying out of supermax and that the processes for determining which inmates are placed and kept there were constitutionally inadequate.

The district court found a liberty interest and turned to the question of what process is due. It concluded, "at a minimum, inmates at the OSP should be afforded the same procedural protections as those described in *Wolff*." *Austin I*, Pet. App. 101a. It therefore ordered Ohio to provide the protections listed in *Wolff*, along with other specific protections beyond *Wolff*, including the following:

- Inmates must be provided "advanced written notice of all the specific evidence" to be considered. Matters not so identified cannot be considered. *Austin I*, Pet. App. 106a, 114a; *Austin II*, Pet. App. 39a–40a.

- Inmates must be allowed to call witnesses absent overriding security considerations. *Austin I*, Pet. App. 106a; *Austin II*, Pet. App. 42a.

- Decisionmakers are restricted in the use of confidential information; specifically, if officials wish to rely on the statement of a confidential informant, they must "indicate this reliance and shall disclose as much of the substance of the information as possible." *Austin II*, Pet. App. 40a–41a (internal quotation marks omitted).

- Decisionmakers must provide exhaustive, "detailed and specific justification for [their] decision[s]." *Austin II*, Pet. App. 42a; *Austin I*, Pet. App. 120a. Not only must the classification committee issue such an opinion, but on appeal, both the Warden and the Bureau of Classification must provide written justifications as well. *Austin II*, Pet. App. 41a–42a; *Austin I*, Pet. App. 120a.

- The court also ordered that inmates already in Level 5 be told "what specific conduct is necessary . . . to be reduced from Level 5 and the amount of time it will take before" that occurs. *Austin II*, Pet. App. 44a.

Ohio appealed, arguing that *Wolff*-type procedures were not required, and were thus improperly imposed. Ohio said that *Wolff* was a poor fit because its procedures are aimed at determining specific historical facts, while a supermax placement decision is a predictive, subjective decision, based on a wide range of factors. Ohio urged the use of the more flexible model adopted for predictive decisions in *Hewitt*, *Greenholtz*, and *Horowitz*, and argued that our New Policy provided far more process than those cases require.



The Sixth Circuit rejected that argument. Two judges concluded that all deprivations significant enough to implicate a liberty interest under *Sandin*'s heightened standard are serious enough to create a presumption that *Wolff*-type procedures are necessary. *Austin*, Pet. App. 21a–22a. "Any liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due." *Id.* at 22a n.12. The majority also discounted the significance of the predictive nature of the underlying decision: "It is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance." *Id.* at 18a–19a. The third judge concurred in part and dissented in part, disagreeing with the imposition of the "comprehensive notice requirement," but agreeing with the imposition of other procedures. *Id.* at 35a (Rogers, J., concurring in part and dissenting in part).

Ohio now asks this Court to reverse the Sixth Circuit's judgment that Ohio violated the inmates' due process rights in reclassifying them and transferring them to OSP.

## SUMMARY OF ARGUMENT

This case turns on two major propositions, one legal, and one factual, and together they leave no doubt that Ohio's procedures for placing prisoners in a "supermax" facility go far beyond what due process requires.

First, this Court's precedents establish that informal, non-adversarial procedures satisfy due process when prison officials make predictive judgments, such as prison placements generally. Such placement decisions turn on subjective judgment calls and on prison officials' expertise, and do not result from the application of a set formula. Thus, the quality of such decisions would not be enhanced by the type of procedures aimed narrowly at retrospective factfinding, such as those used in disciplinary proceedings.

This principle flows directly from the three-part balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and developed in cases such as *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). In such cases, the Court has fully explained why, even outside the prison context, predictive judgments are categorically different from retrospective factfinding, thus requiring less formal procedures.

Equally important, the Court has repeatedly applied this principle in the prison context. Specifically, in *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court explained how placement in administrative segregation is a predictive judgment that does not require the type of formalized process that the Court has required in prison-discipline cases.

The court below largely agreed with this description, but thought that *Sandin v. Conner*, 515 U.S. 472 (1995), changed the rules for determining what process is due under *Mathews* and *Hewitt*. But in fact, *Sandin* concerned only the



test for the existence of a liberty interest, and thus governs only *whether* due process is required at all, not *what* process is due.

Second, under this established legal framework, the facts here show that Ohio's prison placement decisions are, in fact, predictive decisions, and thus fall squarely under the *Hewitt* framework. Such decisions are not converted from predictive to retrospective merely because Ohio's prison officials consider historical facts such as inmate misconduct, as the placement decisions are not made to punish inmates for that past misconduct, but are made to prevent future problems. The *Wolff*-type procedures imposed below do not add to the quality of the decisions, but instead degrade the process and add unneeded costs.

Moreover, applying the other *Mathews* factors to the facts here further confirms that *Wolff* process is not required. A prisoner's interest in avoiding OSP is not that strong, while Ohio's interest in removing disruptive inmates from the general population is a strong one, as such transfers not only benefit orderly prison administration and protect staff, but ultimately protect other inmates from their fellows.

For these and other reasons below, the judgment below should be reversed.

## ARGUMENT

### A. Due process does not require detailed formal procedures in situations involving predictive decisions.

While the Court has never specifically addressed the process due for placement in a supermax facility, it has addressed similar decisionmaking processes, both outside and inside the prison context. And in addressing similar decisional processes, the Court has consistently distinguished between, on one hand, decisions that are predictive, subjective, and multivariate, and on the other hand, decisions that are narrowly retrospective, such as disciplinary decisions. The Court has consistently concluded that due process does not require formalized adversarial procedures when public officials make decisions of the first type.

#### 1. In predictive-decision cases, the nature of the decision is the most important *Mathews* factor.

In *Mathews v. Eldridge*, the Court set forth the three-part balancing test to be used in deciding what process is due before the State deprives an individual of a liberty or property interest. 424 U.S. at 334–35. The Court prefaced those factors with the reminder that due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Court then set out "three distinct factors" to be considered:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the



> function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335. In evaluating the second factor, regarding the reliability of the challenged procedures and the possible value of extra process, the Court noted that these questions depend on the *nature* of the decision being made. "Central to the evaluation of any administrative process is the nature of the relevant inquiry." *Id.* at 343. That is, the nature of the decision often determines whether additional procedures would add value.

Following *Mathews*, the Court has repeatedly demonstrated how the nature of the decision at issue is the critical factor. One key principle, which arises even outside the prison context, is the distinction between retrospective, fact-specific decisions and predictive, subjective decisions that are based on multiple factors. The Court has repeatedly concluded that procedures appropriate for the former are ill-suited for the latter.

Where the decision at issue is based solely on objective, retrospective factfinding, such as in disciplinary procedures predicated on past conduct, then formalized procedures add value, as they aid in finding facts as precisely as possible. Thus, for example, when the Court addressed the process due for disciplinary proceedings in a school setting, the Court required "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

But in contrast to the disciplinary context, the Court required less formal procedures when a school dismissed a student for academic reasons—and the *nature* of the decision

was the key distinction. See *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). In *Horowitz*, the Court distinguished *Goss* on the grounds that "[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement." *Id.* at 89. The Court detailed several specific ways in which the academic and disciplinary dismissals differed, all rooted in the core distinction between retrospective, objective factfinding and prospective, subjective judgment calls. In *Goss*, the disciplinary case "rested on factual conclusions that the individual students had participated" in specific acts of misconduct. *Id.* By contrast, the academic dismissal in *Horowitz* turned on "subjective and evaluative" decisions about prospects for future success, and those decisions "rested on the academic judgment of school officials." *Id.* at 89–90.

The Court in *Horowitz* also noted that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of *cumulative* information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90 (emphasis added); see also *id.* at 91 n.6 ("[T]he school considers and weighs a variety of factors, not all of which, as noted earlier, are adaptable to the factfinding hearing."). As the concurring opinion put it, "evaluations, which go far beyond questions of mere 'conduct,' are not susceptible of the same sorts of procedural safeguards that are appropriate to determining facts relating to misconduct." *Id.* at 95 n.5 (Powell, J., concurring).

Notably, the Court had no problem categorizing the academic-dismissal decision as prospective, notwithstanding that many of the factors being weighed were retrospective in nature. That is, in making its prospective decision about the student's prospects for success, the school, not surprisingly,



relied largely on the student's historical track record of academic problems. As the Court recounted, the student's history included that "several faculty members expressed dissatisfaction with her clinical performance," that her "performance was below that of her peers," that she had "erratic attendance at clinical sessions," and even "that she lacked a critical concern for personal hygiene." *Id.* at 80–81 (internal quotation marks omitted). All of these retrospective facts were among that the "cumulative information" that, the Court noted, would be considered in the prospective evaluation decision. *Id.* at 90. But the inclusion of those retrospective facts did not alter the fundamentally prospective nature of the decision.

To be sure, any of those individual historical facts could have been subjected to more formalized factfinding and to adversarial challenge. One could even hypothesize that an error could be corrected in the particulars, e.g., that the "erratic attendance" included only X, rather than Y, missed days. But such narrow error-correction, even if it were facilitated by more stringent procedures, would not truly add value when the question being asked was not whether X or Y was the accurate tally, but whether, in light of several factors, the academic experts judged the student likely to have a bright future as a student and doctor. That is, because the *nature* of the decision was ultimately subjective and predictive, formalized procedures would not add to the quality of *that ultimate decision*, even if formalized procedures might have better clarified the precise contours of the student's attendance problems, performance problems, and the like, or allowed the student to better challenge those facts.

*Horowitz* also establishes another key point—where the decision is predictive, the other *Mathews* factors, especially the private interest affected, carry very little weight, if any. In *Horowitz*, the Court expressly noted that the private-

interest factor of *Mathews* weighed far more heavily in the student's favor in *Horowitz* than it had in *Goss*. The Court explained that it "fully recognize[d] that the deprivation to which respondent was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension to which the high school students were subjected in *Goss*." *Id*. at 86 n.3. But that did not matter, in light of the drastic difference in the nature of the decision. The Court acknowledged that the private interest at stake was part of the *Mathews* equation, *id*., but found that the nature of the decision remained dispositive.

Thus, even outside the prison context, the Court has firmly established that predictive decisions, especially those that include subjective weighing of multiple factors and the exercise of professional judgment, do not call for stringent due process requirements. That is so even where the individual's private interest seems strong, as the strength of the interest does not overcome the more important point that extra process should not be imposed if it does not aid the decisionmaking process.

**2. Under *Hewitt*, prison-placement decisions are the type of predictive decision for which non-adversarial informal process is sufficient.**

In the prison context, the Court has explained, and applied, the same distinction that it did in *Horowitz:* predictive, subjective decisions require less formalized due process than retrospective factfinding. And the Court has also plainly demonstrated that prison placement decisions fall on the predictive, subjective side of that divide.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court set the benchmark for formalized due process requirements where retrospectively-oriented factfinding is at issue. In *Wolff*, prisoners raised a due process challenge to the



disciplinary proceedings used in Nebraska's prison system. Those proceedings determined whether or not a prisoner committed a given violation, and a "guilty" finding could lead to the loss or withholding of good-time credits as punishment for the misconduct. *Id*. at 547. The Court held that due process required such disciplinary proceedings to include several specific features, including "advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Id*. at 563. The Court also required "that the inmate . . . should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id*. at 566.

But since *Wolff*, the Court has repeatedly rejected attempts to apply *Wolff*'s retrospective factfinding procedures to prison situations involving predictive, subjective decisions. For example, the Court explained this difference in the parole setting in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). In *Greenholtz*, the Court rejected a call for *Wolff*-type procedures in parole hearings because "experience has shown, that the parole-release decision is . . . essentially an experienced prediction based on a host of variables," *id*. at 16, one that is "necessarily subjective in part and predictive in part," *id*. at 13, requiring consideration of what "the entire record shows," *id*. at 15. The Court therefore concluded that "[p]rocedures designed to elicit specific facts . . . are not necessarily appropriate." *Id*. at 14. Notably, the interest at stake in *Greenholtz*—parole, or release from prison—was as strong or stronger than the interest in good-time credit had been in *Wolff*. Despite the undoubtedly strong interest in parole, however, the Court found that the predictive and subjective nature of the decision meant that less formal procedures satisfied due process requirements.

The Court again drew this categorical distinction in *Hewitt v. Helms*, 459 U.S. 460 (1983), which involved a type of decision similar to that at issue here—there, a placement in administrative segregation designed to limit problems related to a disruptive prisoner—and it found that such a predictive decision did not call for *Wolff*-type fact-finding procedures. In rejecting such procedures, the Court stressed the predictive nature of the decision: "The judgment of prison officials in this context . . . turns largely on purely subjective evaluations and on predictions of future behavior." *Hewitt*, 459 U.S. at 474 (internal quotation marks omitted).

Importantly, the Court stressed that the judgment involved was not only predictive, but also that it turned on several variables at once, including variables that were not tied to the individual prisoner's record. "[A]dministrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like," requiring officials to "predict not just one inmate's future actions . . . but those of an entire institution." *Id.*

In *Hewitt*, the Court also addressed the other two *Mathews* factors, noting that the government's interest in security was high, while the prisoner's interest in avoiding administrative segregation was low. *Id.* at 475–76. But the Court's emphasis on the nature of the decision demonstrates that that factor was dispositive.



### 3. *Sandin* did not change *Hewitt*'s application of *Mathews* to predictive decisions.

In Ohio's view, the above cases, from *Mathews* through *Horowitz* to *Hewitt*, are enough to fully answer the question presented, and *Sandin v. Conner* does not even warrant a mention. That is so because *Sandin* dealt solely with the standard for the existence of a liberty interest—an issue that Ohio does not contest here—and that case said nothing about what process is due once a liberty interest is established. Indeed, *Sandin* is so far afield, in our view, that the analysis should proceed directly from the law above to the facts of Ohio's supermax placement process, without any detour whatsoever into a discussion of *Sandin*. This discussion is needed only because the appeals court reasoned that *Sandin* did, somehow, change *Hewitt*'s application of *Mathews*, thus requiring more process here. But it was wrong, as *Sandin* did no such thing.

What the Court did do in *Sandin* was raise the bar on what a prisoner must show to establish that a liberty interest exists at all, in order to trigger *any* due process protection. Before *Sandin*, courts had begun to define state-created liberty interests by looking solely to whether prison regulations had "mandatory" sounding language that implied that a right was enforceable, without regard to the substance of the condition at issue. See *Sandin*, 515 U.S. at 480–83. That led to several undesirable results, including "disincentives for States to codify prison management procedures," and the "involvement of federal courts in the day-to-day management of prisons." *Id.* at 482.

To restore a focus on protecting only serious deprivations in a prison context, the Court held in *Sandin* that a State-created liberty interest would be found only where the deprivation or restraint "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of

prison life." *Id.* at 484. Thus, a State's "mandatory" language in a regulation, although still necessary, is no longer sufficient; an inmate must show "atypicality" and "significance" as well.

Because the *Sandin* Court went on to find that the prisoner there did *not* have a liberty interest under this standard, it did even address the what-process-is-due issue, let alone change the law on that score. Indeed, at the one point where *Sandin* includes a passing reference to what-process-is-due, the Court expressly stated that it was *not* overruling any prior case. See *id.* at 483 n.5. And since *Sandin*, this Court has never cited it in the context of what-process-is-due.

Nevertheless, the Sixth Circuit below found that *Sandin* changed the what-process-is-due analysis. In the court's words "*Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic fashion in which they applied the *Hewitt/Wolff* dichotomy" for determining the process due a prisoner. *Austin*, Pet. App. 18a. In particular, that court concluded that *Sandin* shifted the focus from the nature of the decision and thus the value of extra process—which was the critical *Mathews* factor in *Hewitt* and *Horowitz* and other cases—to the degree of the prisoner's interest. As the court explained it:

> After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake. It is not enough to say that a particular decision is "forward-looking"; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the nature of the decision which strikes the due process balance; it



> is the nature of the interests on both sides of tha balance.

*Id.* at 18a–19a. This was the critical part of the court's opinion, as it was the court's shift in emphasis to the prisoner's interest, as a matter of law, that enabled the court to then distinguish this case from *Hewitt* on the facts, as the court later found that the prisoner's interest in avoiding supermax placement was stronger than the interest in avoiding administrative segregation had been in *Hewitt*.

But the Sixth Circuit was wrong, as nothing in *Sandin* instructs courts to now approach the *Mathews* factors with an enhanced focus on the private-interest factor. Nothing in *Sandin* eliminates the common-sense distinction, explained in *Greenholtz*, *Hewitt*, and *Horowitz*, between predictive decisions and retrospective factfinding. If weightier private interests did not require greater process where outright release from prison was at stake in *Greenholtz*, then it is hard to see how *Sandin*'s focus on more "significant" changes in conditions while in prison works such a change. Thus, the Sixth Circuit was wrong to begin the process-due analysis with a "higher presumption of process due than" it would have pre-*Sandin*. *Austin*, Pet. App. 22a n.12.

Indeed, the Sixth Circuit provides precious little explanation of precisely how it believes *Sandin* changed the *Mathews* approach. The court simply said that after *Sandin*, "because only those conditions that constitute 'atypical and significant hardships' give rise to liberty interests, those interests will necessarily be of a weight requiring greater due process protection." *Id.* at 21a–22a. Further elaborating in a footnote, the court added that in comparing "those liberty interests found to exist post-*Sandin* with those found to exist pre-*Sandin* . . . it is important to remember that many liberty interests which required less process in the past would require no process now." *Id.* at 22a n.12. That, said the

court, meant that "[a]ny liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due than those which may have been found pre-*Sandin*."

It is not entirely clear what the appeals court meant when it said that *Sandin* now creates a "higher presumption of process due." One possibility is that the "presumption" means that *Sandin* calls for courts to apply *Mathews* in a different way from before, applying a greater weighting factor to the private interest than was the case under *Hewitt*, *Greenholtz*, and so on. That seems to be what the court most likely meant. The Court insisted that post-*Sandin* it "is not enough to say that a particular decision is 'forward-looking'" without also looking to the private interest at stake. But in *Greenholtz*, it *was* enough to look primarily at the nature of the decision without giving much weight to the private interest, even where that interest seemed strong. And the Sixth Circuit gave no clue as to how or why *Sandin* overruled cases such as *Greenholtz* in that regard.

Alternatively, it is perhaps possible to read the appeals court's "higher presumption" as just a predictive observation, and not as a warrant to apply *Mathews* differently. That is, *Mathews* applies exactly the same as before in any given case, but *Sandin*'s higher liberty-interest threshold will mean that those cases that clear that threshold will now include a higher proportion of cases that call for *Wolff*-type process.

But reading the court's *Sandin* theory this way raises two separate problems. First, it does not seem to be what the court meant, for as noted above, it did apply *Mathews* in a novel way. Second, even if the court below viewed *Sandin* as merely producing a differential effect, as opposed to changing how to apply *Mathews* in a given case, that more moderate view is still wrong. It is wrong because even a differential-effect theory rests on the flawed premise that the

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degree of a prisoner's deprivation was indeed a major input in the process-due equation, pre-*Sandin*, but that was not the case.

In other words, the appeals court's reasoning would make sense if the pre-*Sandin* cases had created a spectrum based largely on degree-of-deprivation, with smaller deprivations getting some process, and the largest deprivations getting more process. Converting the smaller deprivations into no-process-at-all cases would indeed leave the remaining ones with "more process due." But *Hewitt* and *Horowitz* teach that, where the nature of the decision is predictive and subjective, less process is due *even when the individual's interest seems very strong*.

While *Hewitt* and *Greenholtz* establish this principle in the prison context, *Horowitz* is in many ways the better example, because of its stark comparison with *Goss*, as explained above (at 17–18). In *Horowitz*, the Court found that less process was required for academic dismissal than had been required for disciplinary suspension in *Goss*, *even though* the deprivation in *Horowitz*—outright expulsion—was far more severe than the 10-day suspension imposed in *Goss*.

Indeed, given *Horowitz*'s reasoning and holding, the best way to illustrate the flaw in the appeals court's analysis is to consider what effect, if any, a decision analogous to *Sandin*—but in a school setting—would have on *Horowitz*. That is, suppose that the Court were to hold that, from now on, only more severe deprivations would count as protected liberty or property interests *at all* in the school setting, and suppose further that the Court specified that suspensions did not meet that bar, while more serious consequences such as expulsions would. Such a "*Sandin* for schools" decision would, obviously, reverse the result in *Goss*, as a ten-day

disciplinary suspension would no longer warrant any due process protection at all.

In Ohio's view, though, such a "*Sandin* for schools" decision would leave *Horowitz*—which involved a non-disciplinary expulsion—untouched. Because the nature of the decision would remain the same (i.e., a predictive assessment), both *Horowitz*'s reasoning and result would remain the same. That is, the seriousness of the deprivation would be enough, even after a "*Sandin* for schools," to trigger *some* due-process protection, but, because of the predictive nature of the decision, it would be an informal process, closer to *Hewitt* than *Wolff*.

The Sixth Circuit's reasoning, by contrast, would mean that a "*Sandin* for schools" would reverse *Horowitz*. Because due process protection would then be reserved for "more significant" deprivations, courts would begin with a "presumption" in favor of more process.

The problem with that approach, though, is that, as explained above, the Court has not required "more process" simply because "greater deprivation" is involved. That may be the case *within* the disciplinary context, where heavier discipline may call for more process. But with regard to predictive, multivariate judgments, the degree of deprivation matters much less, as for such decisions, more formal process simply does not add value. Thus, the Sixth Circuit was wrong to reason that *Sandin*, by reserving protection for more-significant deprivations, should require courts to apply a "presumption" in favor of more process.

Finally, although *Sandin*'s liberty-interest holding does not affect the process-due question, *Sandin*'s broader teaching does have meaning here—and that meaning helps Ohio, not the Respondent inmates. The Court explained in *Sandin* that the previous approach to finding State-created



liberty interests, by focusing solely on mandatory language in prison regulations, "create[d] disincentives for States to codify prison management procedures in the interest of uniform treatment." *Sandin*, 515 U.S. at 482. The disincentive occurred because States could easily "avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Id.* The Court properly saw this disincentive as a bad thing, as prisons are better off when they can give written guidance to management and staff, and even to inmates. The Court took the step it did in *Sandin* largely to allow States to make written commitments without the fear of triggering litigation over every detail of prison life, such as tray lunches versus sack lunches. *See id.*

*Sandin* largely cured that perverse-incentives problem, but the Sixth Circuit's approach, if adopted by the Court, would create a similar, but perhaps worse, problem of incentives with regard to supermax prisons or other potentially significant prison conditions. That incentive problem exists because, after *Sandin*, a prisoner must still show that a State has created a liberty interest through some mandatory language in a regulation, and *in addition*, the inmate must show that the challenged condition involves an "atypical and significant hardship." *Id.* at 484. A "significant" hardship alone does not create a liberty interest without some language, except for the even-more-extreme cases where a liberty interest is not "State-created," but where the Due Process Clause gives protection of its own force, even without State creation. *Id.* at 479 n.4, 484 (citing *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) (transfer to mental hospital), and *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (involuntary administration of psychotropic drugs)).

Thus, since even after *Sandin* States can still control whether they create a liberty interest, a decision that requires

burden some procedures every time one exists creates a strong incentive for States to avoid mandatory language in the context of conditions that might be considered significant and atypical. That is, a State may find that its own penological interests in having an established policy make it worthwhile to use mandatory language, and to trigger a liberty interest, if it knows that *Hewitt*-style procedures will still be enough in appropriate cases, e.g., for predictive decisions. But if States know that *Wolff* process, or more, will be "presumed" whenever a liberty interest is triggered, we will have a stronger incentive to avoid creating such interest.

That would turn *Sandin*'s intent on its head, as we would now be free to adopt mandatory language, without risk, regarding tray lunches, but we would feel constrained to give our wardens and staff the least guidance where the greatest issues are at stake. Surely that is not what the Court intended in *Sandin*, and it is not what the Court should cause here.

## B. Ohio's policy for placing inmates in supermax provided adequate due process for this type of predictive decision.

Applying the legal framework established above, the ultimate question here, of course, is whether Ohio's Policy would provide sufficient process to the inmates that it classified at the highest-security level, thus causing them to be transferred to Ohio's highest-security prison, the Ohio State Penitentiary. The answer is yes, as Ohio's Policy, before being rewritten by the courts below, gave more extensive procedures than the Due Process Clause requires.

First, and most important, Ohio's placement decisions are the same type of predictive, multivariate decisions that the Court has already found, in *Hewitt* and other cases, to be best suited to informal, non-adversarial proceedings. The



facts here show that placement at OSP is indeed such a decision, and is not a retrospective disciplinary measure. Further, the facts also show that the specific procedures ordered by the lower courts do not add reliability to the decisionmaking process at issue; instead, the extra procedures add costs and degrade the process.

In addition, the remaining two *Mathews* factors—the inmates' private interests and the government's interest—weigh against requiring more process than Ohio provides here. The inmates' interest in avoiding OSP is not that high, as conditions there do not differ much from the highest-security conditions in the next-highest security prison, from which most of the OSP inmates come. Meanwhile, Ohio has a very strong interest in making these placements without unneeded burdens, as we make these judgments in order to preserve safety and protect inmates throughout the system.

### 1. Ohio's decisions to place prisoners in OSP are ill-suited to the *Wolff*-type procedures that the court below imposed.

#### a. OSP placement is a predictive, subjective, multivariate judgment, not a disciplinary punishment.

The decision to classify an inmate at Level 5, and thus to send him to OSP, is a textbook example of the type of predictive, subjective, multivariate judgment that the Court discussed in *Hewitt* and *Greenholtz*. That is so because Ohio does not place an inmate at OSP as punishment for a specific act; instead, we put an inmate there when prison officials judge that the system as a whole is better off if that inmate is at OSP. That decision calls for professional judgment based on many factors, including factors related to the system as a whole, not just the individual inmate's record.

In a study by the National Institute of Corrections, an arm of the United States Department of Justice, corrections expert Chase Riveland explained how "supermax" placements generally are subjective, involving prediction and future risk assessment. "Diagnosis, prediction, risk assessment and identification of causal factors to violent acting out often defy objective criteria and invite a significant degree of subjectivity. Prison administrators should be cognizant of that difficulty in defining admission, release and length of stay criteria." Riveland, *supra*, at 9.

The study's author, Dr. Riveland, along with other corrections experts such as Dr. James Austin, also testified at trial about how Ohio's specific system calls for judgments that cannot be reduced to mechanical factfinding. J.A. 381–83 (Riveland Test.), 432, 433–34 (Dr. Austin Test.). Dr. Austin explained how objective data are part of the equation, but that subjective judgment must be applied to the data:

> Well, there are factors that you would look at that need to be evaluated and that should be done based on objective data, but *ultimately it's going to be a subjective judgment* by a person or an office which is going to be *based on their experience and how they feel about the risk.*

*Id.* at 433 (Dr. Austin Test.) (emphasis added).

The Policy itself demonstrates how the process is future-oriented, not retrospective, as it looks at past behavior as a guide to whether future problems are likely. For example, it asks whether "[t]he nature of the criminal offense committed prior to incarceration constitutes a *current threat* to the security and orderly operation of the institution and to the safety of others." Policy § VI(C)(2), J.A. 21 (emphasis added). It further looks to whether "the inmate, through



repetitive and/or seriously disruptive behavior, has demonstrated a *chronic inability* to adjust to level 4B *as evidenced by repeated class II rule violations*." Policy § VI(C)(9), J.A. 22 (emphasis added).

Of particular note, the Policy allows for inmates to be classified at Level 5 immediately upon entering the prison system. That shows that the system is not punishing inmates for in-prison behavior, but is trying to predict which inmates belong at each security level. Of course, that often requires consideration of a prisoner's past behavior, just as the predictive decision in *Horowitz* included consideration of the student's past performance, but the decision itself is prospectively focused.

Dr. Austin also explained how such a placement decision does not rest solely on the individual inmate's record, but also turns on factors related to the prison system as a whole. He testified that prison officials often "are looking at the overall situation in the entire prison system . . . if things are problematic elsewhere, they are going to be reluctant to be releasing people that have a history. So they are looking at the entire picture." J.A. 451 (Dr. Austin Test.).

In every respect, Ohio's placement decisions are akin to the administrative-segregation decision at issue in *Hewitt*. In particular, the Court in *Hewitt* explained not only the predictive and subjective aspects of such placement decisions, but also how such decisions involve facts outside an individual inmate's file:

> [P]rison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*,

> and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents.

*Hewitt*, 459 U.S. at 474. The same is true here. Consider, for example, a decision whether to retain a known gang leader in OSP, or whether to return him to the next-lower security level. Even if that gang leader has been a model inmate at OSP, officials may decide that it is not worth the risk to return him if tensions between rival gangs have been especially high lately, or if his old gang has had internal leadership battles.

For the most part, the appeals court's decision did not seem to turn on a dispute over whether Ohio's placement decisions truly have these characteristics. Rather, the court ruled against us primarily on the theory that *Sandin* shifted the focus away from the nature of the decision. *Austin*, Pet. App. 18a–19a. In conjunction with that shift-of-focus, the Sixth Circuit also said that the inmates' interests weighed more heavily here than in *Hewitt*. *Id.* at 21a–23a.

But the appeals court did seem to view Ohio's process as retrospectively focused, and to the extent the court did so, it was wrong. The Sixth Circuit said that Ohio, under its own regulations, "can place inmates at OSP only in the presence of certain factual predicates, all of which are historical in nature." *Id.* at 23a. Thus, said the court, because Ohio "set out a detailed and restricted list of reasons why inmates can be put at OSP," we cannot "turn around and argue that the district court's order decreases [Ohio's] ability to rely on 'rumor, reputation, and even more imponderable factors,' for those factors are illegitimate under [Ohio's] own placement



scheme." *Id.* This view is wrong both because it misreads our Policy and because it creates perverse incentives.

It misreads our Policy because, while the Policy sets substantive criteria for classification decisions, it calls for officials to apply those criteria to already-established facts, and it does not call for factfinding at any step in the process. For example, officials look to whether an inmate has a record of disruptive behavior, but officials look to the record of findings by the Rules Infraction Board and take those findings as a given; they do not investigate the facts to determine *whether* the inmate has been disruptive. Then, taking those established disruptions as a *starting point*, the officials determine whether that level of disruptions warrants an inference of ongoing or future problems, and thus warrants a Level 5 classification.

The Sixth Circuit's description further misreads the Policy in that the Policy not only calls for officials to work with existing facts, as opposed to instigating factfinding, but the Policy also does not set any evidentiary threshold of proof that officials must use before relying on a given piece of information. Thus, for example, a Level 5 classification may be appropriate if the "inmate has been identified by the institution Security Threat Group Coordinator as a leader" of a gang. Pet. App. 128a. But the Policy does not require the Coordinator to meet any certain proof standard; the Coordinator may rely on "rumor" or "reputation," if accurate in his professional judgment, in identifying an inmate as a gang leader. *Austin I*, Pet. App. 115a–16a; see *Hewitt*, 459 U.S. at 474. The classification committee and other officials may then take the Coordinator's judgment as a given, without conducting factfinding regarding the inmate's gang membership. All of this demonstrates that the Policy was never meant to have a factfinding aspect, yet the decision below tries to force the Policy into that model.

The Sixth Circuit's view also creates negative incentives. The court used Ohio's self-imposed limits as a baseline, implicitly assuming that due process demands at least that much, and then the court imposed more procedures on the theory that the additional steps are only keeping us to our own promises, or are not adding that much more. But Ohio submits that our Policy gives far more than the Constitution requires, both substantively and procedurally; and we urge that we should not be penalized for doing so.

In sum, Ohio's OSP placement decisions are precisely the type of decision that this Court discussed in *Hewitt*. And as shown below, our own adopted Policy more than satisfied due process for that type of decision, and the added procedures imposed by the courts below do not aid the decisionmaking process.

**b. The court-ordered modifications do not reduce the risk of error or otherwise add to the quality of the decisionmaking.**

The ultimate question in any process-due case is this: would extra process add any value? The nature-of-decision analysis above ties in to this factor, because if the question is "what happened?," then *Wolff*-type procedures might help, but if the question is "what might happen?," then adversarial factfinding will likely not enhance the process significantly. Here, the process will not be aided at all by the procedures that the courts below imposed upon Ohio, and that is shown not only by viewing the nature of the decision, as explained above, but it is also demonstrated by reviewing the specific changes that the court ordered.

As an initial matter, any such court-ordered procedures would be appropriate only if the court first found an unacceptable "risk of error" in the process to begin with—yet both courts below erred in analyzing that issue. In assessing



the "risk of error," it is important to note that Ohio voluntarily abandoned its old policy and adopted New Policy 111-07 during the trial. Thus, that New Policy should have been the benchmark. Yet the Sixth Circuit implicitly held us to the earlier, abandoned policy when it faulted Ohio for "past erroneous and haphazard placements at OSP, which go unchallenged on appeal." *Austin*, Pet. App. 22a. Even if mistakes were made in the past, our latest Policy more than cured any such problems. But nowhere in its opinion did the appeals court specifically state that the New Policy was inadequate; rather, it proceeded directly to saying that the changes ordered by the district court were appropriate.

And while the district court expressly found that even the New Policy was not good enough, it based that finding almost exclusively on its conviction that full-fledged *Wolff* procedures set the standard that we had to meet. *Austin I*, Pet. App. 105a ("Because of the liberty interest involved resulting from the length and the conditions of confinement at the OSP, and the Court's discussion of the *Mathews* factors, the Court holds that the plaintiffs are entitled to the minimal procedural requirements announced in *Wolff*.").

The district court thus imposed, and the appeals court upheld, several *Wolff*-based procedures. The court ordered prison officials to give a detailed advance notice, and equally important, it said that officials could not consider any information that was not expressly disclosed in the notice. That modification alone is an improper burden, as it not only requires prison officials to document every possible piece of information before the hearing, but by prohibiting officials from considering anything outside the notice, this "procedural" requirement restricts the *substantive* scope of the inquiry. If new information surfaces between the notice and the hearing, the officials' hands are tied. But it is hard to see how this restriction offers *any* countervailing benefit in

terms of improving the quality of decisionmaking, as it can act only to exclude relevant information.

The other court-ordered changes are equally inappropriate, as they, too, fail to add value to the process. The ordered changes, though varied in specifics, all share one common feature: they are perhaps perfectly sensible for disciplinary proceedings, but carry little or no value—but do impose great cost—for predictive placement decisions. For example, the court insisted that prisoners be able to call witnesses, subject to a showing of a security risk. Calling witnesses makes sense if the question is "what happened?" But here, the question is whether prison officials predict that this inmate will be a problem if left in, or returned to, a lower security level. His fellow inmates' opinion adds little to *that* question.

Similarly, the court restricted ODRC's ability to rely on confidential information, but that restriction is improper in light of the nature of the decision at issue. Confidential information may be relevant not only to the inmate at issue, but such information may be relevant to officials' consideration of the broader prison system environment, beyond this individual. For example, prison officials may have inside knowledge that rival gang tensions are rising, or preliminary indications that a riot may be coming. Limiting the use of that information—or, just as bad, requiring the officials to document that information in a written opinion—makes no sense.

All of these procedures might make sense, again, if the procedures at issue were disciplinary proceedings, as in *Wolff*, but they are not. The only aspect of the placement process that is even superficially similar to *Wolff* is the fact that prison officials look to past disciplinary problems—specifically, to "convictions" by the Rules Infraction Board—as a part of the placement process. Policy § VI(C),



J.A. 20–22 But the mere use of such retrospective data, whether as part of the package or even as a primary driver, does not convert a prospective question into a retrospective one, just as the use of historical data in *Horowitz* or *Hewitt* did not convert the inquiries there in retrospective ones.

And even if this retrospective aspect raises some *Wolff*-type concerns, such concerns are fully answered by the fact—entirely overlooked by the court below—that Ohio's inmates *already receive* full *Wolff* procedures in any RIB hearings that might provide predicate facts for any later placement decisions. Ohio Admin. Code § 5120-9-07. Thus, to the extent that any inmate wishes to challenge the facts of any past discipline problems, he has the chance in that disciplinary process. If, later, cumulative discipline issues lead to a proceeding over potential OSP placement, there is no need to reopen the results of prior *Wolff*-compliant hearings.

Indeed, the Court has repeatedly indicated that due process does not require, in a second hearing, relitigation of facts that were previously established in some prior hearing that already provided due process. For example, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court required extensive due process protections in parole revocation proceedings, as the government had to adequately establish the predicate facts of a parole violation before revoking parole. *Id.* at 483–84. However, the Court added that the "parolee cannot relitigate issues determined against him in other forums, as in the situations presented when the revocation is based on conviction of another crime." *Id.* at 490. And in *Wolff*, the Court required written opinions in disciplinary proceedings, in part to establish a solid record for later use by other bodies for other purposes. *Wolff*, 418 U.S. at 564–65. The Court specifically noted that the disciplinary records might be used later in parole proceedings

or "might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered to be incorrigible by reason of frequent intentional breached of discipline." *Id.* at 565.

In other words, *Wolff* itself anticipated the situation we have here, in which prior disciplinary records are referred to as a basis for later transfer decisions. In *Wolff*, the Court said to get the record right the first time precisely because there would not be a new factfinding the second time. Yet the court below ordered Ohio to relitigate established facts. That relitigation adds no value, and is thus unwarranted.

The procedures imposed on Ohio are improperly burdensome for yet another reason—they override, without justification, the deference that should be given to the expert judgment of Ohio's prison officials. That expertise has two components, both of which call for more deference here. First, prison officials have expertise in making the substantive decisions at issue here, regarding security classification of inmates. The Court has repeatedly explained that the problems of prison administration "are not readily susceptible of resolution by decree," *Turner v. Safley*, 482 U.S. 78, 84 (1987) (internal quotation marks omitted), and that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment," *Sandin*, 515 U.S. at 482.

Second, the prison officials' expertise includes not only the substantive area of prison placement, but it also includes expertise in designing procedures that best meet those substantive goals without unneeded red tape. In *Mathews*, the Court explained this independent strand of expertise regarding establishing procedures: "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the



procedures they have provided assure fair consideration of the entitlement claims of individuals." *Mathews*, 424 U.S. at 349. Here, Ohio's prison officials, in performing their duty to "manage a volatile environment," carefully determined what level of process to provide, and *that* decision warrants deference as well.

Moreover, Ohio's judgment that *Wolff*-type procedures are unneeded here is echoed by the judgment of corrections officials around the country. At least 32 States and the federal government operate supermax prisons, and to the best of our knowledge, not one provides procedures even close to what the courts below ordered here. Indeed, Ohio's Policy, without the court-ordered modifications, provides for more than most or all other jurisdictions. California, for example, provides for non-disciplinary supermax placement if an inmate is "deemed to be a threat to the safety of others or the security of the institution," and that determination is left solely to officials' discretion, without any hearing or other required process. See Cal. Code Regs., tit. 15, § 3341.5(c)(1). And the federal government's process for assigning inmates to supermax facilities involves only assessments by prison officials, without any required role for the inmate to participate. See U.S. Bureau of Prisons Security Designation And Custody Classification Manual, Program Statement 5100.07, Chapter 10, Inmate Transfers, at 11–13 (referral procedures and criteria for transfer), available at http://www.bop.gov.

In sum, the procedures ordered by the lower courts do not add to the quality of the decisions at issue, and they intrude upon the province of prison officials. That is reason enough to reverse the judgment below. Moreover, as shown below, the remaining *Mathews* factors also weigh against requiring more process here.

### 2. The prisoners' interests here are minimal.

The court below found that the inmates' interest in avoiding OSP was the critical factor, outweighing the nature of the decision and weighing in favor of more procedures here. *Austin*, Pet. App. 21a–22a. Again, for all the reasons in the above sections, this strong focus on the private interest is the wrong analytical route. But even if the court below had been right to give greater weight, post-*Sandin*, to the inmates' interest, that framework would still not justify requiring more process here. That is because, contrary to the opinions of the courts below, the prisoners' interests in avoiding OSP is not especially high, for, as in *Hewitt*, they were "merely transferred from an extremely restricted environment to an even more confined situation." 459 U.S. at 475.

Life at OSP is not measurably "worse" than life at Ohio's next-highest security level, and 89.5% of OSP inmates when OSP first opened came from that next-highest level. J.A. 167. To be sure, OSP has more restrictive conditions on inmate interaction and on various privileges. But on the other hand, OSP offers better conditions in many ways. Personal security, relations with staff, programming and property privileges are all better at OSP than at other Ohio prisons. J.A. 351–52, 357 (Ishee Test.). And the very features that are often condemned most—the generally restrictive atmosphere and specifically the in-cell isolation for almost all of the time—are a benefit for those who prefer not to face threats from the general population or from their own cellmates.

Indeed, the prisoners' own view supports the idea that the tradeoffs make OSP preferable for many. As one report introduced at trial indicated, "[s]ome inmates [] indicated" that OSP "is better than . . . Lucasville," the prison housing inmates in the security classification immediately below



supermax status, because "individual cells are larger, more personal property is permitted, and [] they don't have to worry about assaults from other inmates." Plaintiffs' Ex. 11 (Peter Davis, *Inspection Report: Ohio State Penitentiary* (1999)).

And for many prisoners, actions speak louder than words. After the trial in this case, Ohio began a policy of allowing Level 4 inmates (i.e., those below Level 5) to *volunteer* to go to OSP, or in the case of many, to stay at OSP when they were reduced from Level 5 to Level 4. Hundreds of inmates have elected to do so. While Ohio recognizes that these voluntary placements are not at issue in this appeal, the fact that these volunteers exist is quite telling, and is germane to weighing the inmates' private interests and thus to the *Mathews* analysis. Cf. *Sandin*, 515 U.S. at 486 n.9 ("Conner's own expectations have at times reflected a personal preference for the quietude of the [Special Housing Unit]. Although we do not think a prisoner's subjective expectation is dispositive of the liberty interest analysis, it does provide some evidence that the conditions suffered were expected within the contour of the actual sentence imposed.")[1]

That is not to suggest that all inmates prefer OSP, or that life at OSP is idyllic. But it is to say that, contrary to the

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[1] In a post-trial enforcement proceeding, Respondents alleged that Ohio's allowance of these voluntary transfers violated the order now on appeal. The district court found that the voluntary nature of the transfers precluded any due process violations. See Order of May 15, 2003 at 18-24, 22 (Record Entry 414) ("Level 4 inmates consistently testified that they had voluntarily chosen to remain at the OSP.") That order is on a separate appeal to the Sixth Circuit (pending as Case No. 03-3840).

lower courts' shared conclusion that living conditions at OSP differ dramatically from those at other prisons, those differences are, in the end, relatively minor. At any rate, the differences are not so great as to alter the *Mathews* analysis significantly from what it was in *Hewitt*.

Apart from day-to-day living conditions, the court below also pointed to a suspension of parole eligibility as a major factor in increasing the weight of the inmates' interest in avoiding OSP. Under Ohio's policy, no inmate may be considered for parole while he is in a Level 5 security status. But this factor is not as weighty as the appeals court found. First, almost 90% of Level 5 inmates came to that status from Level 4, and Level 4 inmates are also ineligible for parole. See Plaintiffs' Ex. 10, Table 9, J.A. 167 (noting 89.5 % came from Level 4); Pet. App. 64a n.10 (noting that parole is possible only from Levels 1–3, then called minimum, medium, and close); ODRC Policy 501.36 § VI(D)(7)(d), J.A. 152 (barring parole for "maximum security," now Level 4). Thus, for those inmates, reclassification to Level 5 did not change their parole status.

Second, Ohio abolished parole in 1996, but maintained the system for those who had already been convicted under our old system. Thus, for any Ohio inmates sentenced since then, the "no-parole-eligibility" rule means nothing.

Finally, for those remaining inmates for whom the parole effect has meaning, it most likely has much less effect in practice than it might seem. To be sure, the rule creates a bright-line rule against parole for such inmates. But as a practical matter, the affected inmates are those who the system has already determined cannot be trusted to safely remain in the general prison population. Thus, it seems unlikely that many would be found ready to leave prison and re-enter society.



On top of the general conditions and the loss of parole eligibility, the courts below also pointed to the length of stay at OSP as a feature distinguishing the placement decisions here from administrative-segregation assignments as in *Hewitt*. A Level 5 placement is reviewed annually, so all prisoners spend at least a year at OSP, with most spending two or more years there. But, while this Court has not set an outer time limit on its *Hewitt* principle, lower courts have repeatedly endorsed lengthy stays in administrative segregation without more than *Hewitt* process. *Clark v. Brewer*, 776 F.2d 226, 228 (8th Cir. 1985) (seven years in "austere and restrictive" confinement); *Mims v. Shapp*, 774 F.2d 946, 948, 949, 951 (3d Cir. 1984) (five years in conditions similar to OSP); *Shoats v. Horn*, 213 F.3d 140, 142, 144 (3d Cir. 2000) (eight years in OSP-like conditions).

Finally, all of these private-interest issues are more than offset by the enhanced protections afforded here relative to *Hewitt*. Unlike in *Hewitt*, most inmates considered for elevation to Level 5 have already been found guilty of disruptive behavior in *Wolff*-compliant disciplinary proceedings. Further, they are given the opportunity to make their case orally during both placement and retention proceedings and are given written decisions at both, protections absent in *Hewitt*. See 459 U.S. at 489–90 (Stevens, J., dissenting). Finally, they are given multiple levels of appellate review, a protection that neither *Hewitt*—nor *Wolff*—contemplate. That more than compensates for whatever marginal differences exist between this case and *Hewitt* in regard to an inmate's private interest.

### 3. Ohio has a strong interest in maintaining prison security without unnecessary burdens.

Finally, Ohio's interests here weigh strongly against requiring more process than our Policy gives. Ohio has a duty to protect staff and fellow inmates from those inmates

who might be a threat. As Respondents' leadoff witness acknowledged, "[H]uman rights concerns cut both ways . . . . We are concerned about the rights of inmates to be safe and free from assaults or being preyed upon by dangerous inmates." Trial Tr. Vol. 1, at 81 (Fellner Test.). And indeed, Ohio has seen a drop in problems in other prisons in the years since we opened OSP. J.A. 454–56 (Meyer Test.).

The appeals court dismissed the strength of this interest by saying that Ohio could simply use the alternate tool of administrative segregation to achieve the same goals with less burden. *Austin*, Pet. App. 22a. But this blithe assertion was wrong. Ohio's sole Level 4 prison (i.e., at the level just below OSP/Level 5) has an administrative segregation wing with just 20 cells. *Austin* I, Pet. App. 51a. That would not fully meet Ohio's OSP needs.

In short, Ohio needs OSP, and we also need the flexibility to use that facility without unnecessary layers of court-imposed red tape. As *Mathews* recognized, the government's interest in any due-process balancing includes consideration of both the "function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Thus, not only is the ultimate function of the placement decisions—prison safety—a concern, but so, too, is the cost of complying with the court-imposed procedures.

Here, the cost of complying with the lower courts' orders comes in several forms. First, as explained above (at 40–41), these "procedural" burdens carry a substantive cost in restricting our discretion in placement decisions. The appeals court purported to overrule the district court's substantive policy modifications, keeping in place only the procedural changes. To the extent the appeals court did reverse those substantive changes, it was right to do so. But the ostensibly procedural notice requirement—that the



inmate be told precisely what evidence will be weighed at his hearing—has the substantive corollary that, once the hearing arrives, officials may not consider any information left out of the notice. That constraint has real effects on decisionmaking, and the effects are not positive.

For example, the constraint on using confidential information forces officials to make a terrible choice. If they decide to go forward without using the information, the decisionmaking is hobbled by the exclusion of relevant information. But if officials wish to include information from a confidential informant, they must "disclose to the inmate as much of the substance of the information as possible." Pet. App. 41a. That disclosure creates the risk that the informant's identity will be discovered, if--as is possible—the inmate receiving the information, or his friends or fellow gang members, know that certain information could have come from only one source. That has drastic and, indeed, deadly implications for the informant.

Less dramatically, the court-ordered procedures consume time and resources. The appeals court discounted this concern simply by asserting that the burdens are not great, without specifically addressing the time element. *Austin*, Pet. App. 21a–24a. The district court, by contrast, specifically found that its requirements would "cause minimal hardship," and it insisted, "officials would only need to expend the additional time to write out their reasons for making a specific classification decision." *Austin* I, Pet. App. 104a–05a. This insistence is ironic, because at another point in its opinion, the district court faulted Ohio for having decisions made by the chief of the Bureau of Classification, who, in the court's view, was already too busy to give much time to such decisions: "The potential for error is little improved under the newly proposed system because it merely gives the final decision to the chief of the Bureau of Classification, an individual who also has a multitude of

responsibilities and little time to consider each case carefully." *Id.* at 103a. The court did not explain how it was improving things to give more work to already busy officials, unless its implicit view was that the work should be transferred to another candidate. But the wardens and the director of the prison department are equally busy, and surely the court did not mean to suggest that we need to hire someone solely to process OSP placements—or if that is the implication, then the burden of that is self-evident.

Consequently, Ohio's legitimate penological interests —which here are ultimately the safety interests of every inmate—weigh heavily against the imposition of the court-ordered procedural hurdles here.



## CONCLUSION

For the above reasons, the judgment below should be reversed.

Respectfully submitted,

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## CONCLUSION

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No. 04-495

# In the Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL., PETITIONERS

*v.*

CHARLES E. AUSTIN, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether the Due Process Clause is satisfied by the application of informal, non-trial-type procedures in making the decision that prison security concerns justify placing an inmate in a supermaximum-security facility.

TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 2 |
| Summary of argument | 7 |
| Argument: | |
| Ohio's procedures for placements in its supermaximum facility are more than adequate to satisfy Due Process | 10 |
| I. *Mathews* v. *Eldridge* provides the appropriate framework for determining what process is constitutionally required to protect an asserted liberty interest | 11 |
| II. Ohio's procedures readily satisfy due process under the circumstances | 16 |
| A. The liberty interest respondents possess, if any, in avoiding placement at OSP is not particularly weighty | 16 |
| B. Petitioners' interest in ensuring the safety and security of inmates and prison staff is compelling | 20 |
| C. The Court-imposed procedures will not substantially reduce the risk of error in petitioners' placement decisions | 21 |
| Conclusion | 29 |


TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Ajaj* v. *Smith*, No. 03-7874, 2004 WL 1663968 (4th Cir. 2004) (108 Fed. Appx. 743) | 19 |
| *Bell* v. *Wolfish*, 441 U.S. 520 (1979) | 15 |
| *Board of Curators of the Univ. of Mo.* v. *Horowitz*, 435 U.S. 78 (1978) | 20, 23, 24 |

Cases—Continued: Page

*Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564 (1972) ..... 10
*Cafeteria & Rest. Workers Union, Local 473* v. *McElroy*, 367 U.S. 886 (1961) ..... 14
*Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458 (1981) ..... 23
*FDIC* v. *Mallen*, 486 U.S. 230 (1988) ..... 28
*Gerstein* v. *Pugh*, 420 U.S. 103 (1975) ..... 22
*Goss* v. *Lopez*, 419 U.S. 565 (1975) ..... 20
*Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979) ..... 14, 17, 25
*Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) ..... 11
*Hewitt* v. *Helms*, 459 U.S. 460 (1983) ..... *passim*
*Kentucky Dep't of Corrs.* v. *Thompson*, 490 U.S. 454 (1989) ..... 16
*Mathews* v. *Eldridge*, 424 U.S. 319 (1976) ..... 6, 8, 11, 14
*McKune* v. *Lile*, 536 U.S. 24 (2002) ..... 17
*Meachum* v. *Fano*, 427 U.S. 215 (1976) ..... 8, 16, 17, 18, 23
*Miller* v. *Henman*, 804 F.2d 421 (7th Cir. 1986), cert. denied, 484 U.S. 844 (1987) ..... 19
*Montayne* v. *Haymes*, 427 U.S. 236 (1976) ..... 16, 17, 18
*Morrissey* v. *Brewer*, 408 U.S. 471 (1972) ..... 12
*Olim* v. *Wakinekona*, 461 U.S. 238 (1983) ..... 17, 18
*Overton* v. *Bazzetta*, 539 U.S. 126 (2003) ..... 21
*Sandin* v. *Conner*, 515 U.S. 472 (1995) ..... 6, 8, 9, 13, 15, 18, 19, 20
*Thomas* v. *Gunja*, No. 03-1129, 2004 WL 2044311 (10th Cir. 2004) (110 Fed. Appx. 74) ..... 19
*Vitek* v. *Jones*, 445 U.S. 480 (1980) ..... 16, 19
*Washington* v. *Harper*, 494 U.S. 210 (1990) ..... 16
*Wolff* v. *McDonnell*, 418 U.S. 539 (1974) ..... 5, 12, 14



Constitution, statutes, and regulations: Page

U.S. Const.:
Amend. XIV (Due Process Clause) ..... 1, 5, 14, 16, 17, 18, 19, 20
18 U.S.C. 3621(b) ..... 26
18 U.S.C. 3625 ..... 26
42 U.S.C. 1983 ..... 5
28 C.F.R.:
Sections 541.40 *et seq.* ..... 2, 10
Section 541.40(a) ..... 2
Sections 542.10-542.19 ..... 27
Sections 542.10-542.20 ..... 28
Section 542.11 ..... 27
Section 542.12 ..... 27

Miscellaneous:

*BOP Program Statement No. 5100.07, Security Designation and Custody Classification Manual*, Ch. 10 (Jan. 31, 2002) <www.bop.gov/progstat/5100-007.pdf> ..... 2, 26, 27
Ohio Dep't of Rehab. and Corr. Policy 111-07 (Mar. 1, 2002) ..... *passim*
Chase Riveland, *Supermax Prisons: Overview and General Considerations* (Nat'l Inst. of Corr. Jan. 1999) ..... 3, 19, 21, 23
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) ..... 26

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS**

## INTEREST OF THE UNITED STATES

This case presents the question whether the Due Process Clause requires prison officials to apply formal, trial-type procedures in determining whether institutional security concerns warrant placing an inmate in a supermaximum-security facility. The Federal Bureau of Prisons (BOP) maintains highly restrictive, non-punitive housing at the Administrative Maximum Security facility in Florence, Colorado (ADX Florence), and the United States Penitentiary in Marion, Illinois (USP Marion), whose conditions are comparable in some respects to those at the Ohio State Penitentiary (OSP), the "supermaximum, or supermax, facility" involved in this case. Pet. App. 1a. The BOP's most restric-

tive non-punitive housing unit is the Control Unit at ADX Florence, which is designed for "inmates who are unable to function in a less restrictive environment without being a threat to others or to the orderly operation of the institution." 28 C.F.R. 541.40(a). The Control Unit currently houses 49 inmates. At both ADX Florence and OSP Marion, BOP also maintains high-security and general-population units that currently house approximately 800 inmates with conditions slightly less restrictive than the Control Unit but still comparable in some ways to OSP's.

Although entry to the Control Unit is preceded by an extensive process involving the inmate, see 28 C.F.R. 541.40 *et seq.*, BOP generally does not apply the kind of procedures that the court of appeals viewed as constitutionally required before transferring an inmate to the Florence and Marion facilities. See *BOP Program Statement No. 5100.07, Security Designation and Custody Classification Manual*, Ch. 10 (Jan. 31, 2002) (setting forth inmate-transfer policy) <www.bop.gov/progstat/5100-007.pdf>. Because affirmance of the court of appeals' decision could have a detrimental impact on BOP's ability to make inmate-transfer decisions in the paramount interest of prison security, the United States has a substantial interest in the resolution of the question presented.

## STATEMENT

1. In May 1998, Ohio opened OSP, its supermax facility, in response to an April 1993 riot at what was then its most secure maximum-security prison, the Southern Ohio Correctional Facility. Pet. App. 2a-3a. Supermax facilities, employed in many States and in the federal prison system, house the most dangerous elements of the prison population and are intended to make the rest of the general prison population safer and easier to control. *Id.* at 2a. According to the National Institute of Corrections, at least 30 States



and BOP had supermax housing as of 1999. Chase Riveland, *Supermax Prisons: Overview and General Considerations* 1 (Nat'l Inst. of Corr. Jan. 1999). "The trend toward proliferation of supermax housing would appear to be at least partially related to the belief that maintaining order in the larger part of a prison—or an entire corrections system—is enhanced by isolating the most serious and chronic troublemakers from the general population." *Id.* at 5.

The conditions at OSP are typical of such supermax facilities. Inmates there are subject to greater restrictions than inmates in other Ohio prisons, including those in administrative segregation at other facilities. These include "extra limitations on personal property rights, access to telephones and counsel, outside recreation, and communication with other persons." Pet. App. 4a-5a. Inmates spend 23 hours per day in their individual cells, which are designed to prevent communication between them. *Id.* at 4a. Inmates have access to two indoor recreation rooms during the one hour per day in which they are permitted to leave their cells and have recreation either alone or with one other inmate. *Ibid.* Inmates having visitors are separated from them by solid windows and are strip-searched whenever they leave and reenter the cellblock. *Ibid.*

The Ohio Department of Rehabilitation and Correction (ODRC) assigns each inmate a security rating of Level 1 (lowest risk) to Level 5 (highest risk) based on a multi-factor assessment of the risk he presents. Pet. 6. A prisoner receives an initial classification upon incarceration, which is subject to change at any time during the prisoner's term. *Ibid.* Prisoners rated Level 1 through Level 4 are housed in prisons throughout the State; Level 5 inmates are automatically housed at OSP unless they are seriously mentally ill. *Ibid.*; see Pet. App. 124a.

The procedures used to place inmates in Level 5 are set forth in ODRC Policy 111-07, the relevant version of which

was scheduled to take effect on March 1, 2002, Pet. App. 122a-140a, had it not been preempted by the district court's decision, *id.* at 47a-121a. Under Policy 111-07, certain ODRC officials may initiate the placement of an inmate in Level 5 by completing a "Security Designation Long Form" that reviews and rates the inmate's characteristics and conduct. *Id.* at 127a. The Warden then designates a classification committee to determine whether the inmate meets one or more of certain heightened-security issues set forth in the "Level 5 criteria." *Ibid.* Those include, *inter alia*, having: engaged in "assaultive and/or predatory behavior"; committed an offense before incarceration that "constitutes a current threat to the security and orderly operation of the institution and to the safety of others"; "lead [*sic*], organized, or incited a serious disturbance or riot"; possessed or conveyed "major contraband"; been identified as "a leader, enforcer, or recruiter" of a prison gang; "escaped[] or attempted to escape"; or "knowingly exposed others to the risk of contracting a dangerous disease." *Id.* at 127a-129a. After providing the inmate with at least 48 hours' notice and the opportunity to be heard in person and in writing, the committee determines whether "the inmate has met one of the criteria * * * and whether the inmate should be placed in level 5" and makes a written recommendation to the Warden. *Id.* at 129a-130a. If the Warden disagrees with a recommendation for Level 5 classification, the inmate is not placed at OSP; if the Warden agrees that Level 5 classification is appropriate, the prisoner is notified and given 15 days to object. *Id.* at 6a. The matter is forwarded to the Bureau of Classification for "final decision." *Ibid.*

Within 30 days of an inmate's placement at OSP, OSP staff reviews the inmate's file "to determine if [he has] been properly classified" and may recommend a security reduction to the Warden. Pet. App. 132a. If the Warden agrees, the recommendation is sent to the Bureau of Classification



for final decision. *Ibid.* If the staff determines that Level 5 placement is appropriate, the staff meets with the inmate to advise him, *inter alia*, "whether release to a general population institution in three years or less appears reasonably possible." *Ibid.*

Review of each OSP inmate's security classification is made "at least annually" in a "supervision review." Pet. App. 137a. After providing the inmate with 48 hours' notice and an opportunity to participate orally and in writing, a three-member classification committee performs a "comprehensive review of the inmate's institutional adjustment and behavior," and, using "professional correctional judgment," makes an assessment of the "risk to safety and security" posed by the inmate based in part on a non-exhaustive list of factors. *Id.* at 137a-139a. The committee then prepares a recommendation "to reduce or continue the inmate's security level," which must include the "basis for its decision and the factors relied upon." *Id.* at 139a. That recommendation is subject to the same review process as the initial transfer recommendation. *Id.* at 139a-140a.

2. Respondents, inmates who are or may be housed in the OSP, filed a class action under 42 U.S.C. 1983 in the United States District Court for the Northern District of Ohio on January 1, 2001, claiming, *inter alia*, that the procedures used to place and keep prisoners at OSP are deficient under the Due Process Clause of the Fourteenth Amendment. Pet. App. 1a, 5a; Pet. ii.

Following a bench trial, the district court ruled that the procedures established by Policy 111-07 fail to satisfy due process. Pet. App. 47a-121a. The court concluded first that respondents have a state-created liberty interest in avoiding placement at OSP. *Id.* at 96a. The court next held that assignment procedures had to meet the requirements of *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). *Id.* at 105a. In particular, the court ordered petitioners to supplement their procedures

by providing each inmate with, *inter alia*: advance "written notice of all the grounds believed to justify his placement at Level 5 and a summary of the evidence that [petitioners] will rely upon for the placement" on pain of being barred from relying on any grounds not mentioned (*id.* at 40a); the ability to call "reasonable witnesses," including other inmates, and to "present documentary evidence" at the classification committee hearing (*ibid.*); a copy of each recommendation and the final decision, which must include a "detailed and specific justification" (*id.* at 41a-43a); and notice, at least twice annually, of "what specific conduct is necessary for that prisoner to be reduced from Level 5" (*id.* at 44a).[1]

3. A divided panel of the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-35a. The majority held first that "inmates enjoy a liberty interest in not being placed at OSP" because OSP "constitutes an atypical and significant hardship" under *Sandin* v. *Conner*, 515 U.S. 472 (1995). Pet. App. 14a. In so holding, the majority relied on the fact that conditions at OSP are more restrictive than those prevailing in Ohio's other prisons. *Ibid.*

The majority next upheld the district court's modifications to Policy 111-07 on the ground that they reflected a proper balancing of the private and governmental interests under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The majority concluded that respondents' private interest in avoiding OSP placement is "necessarily * * * of a weight requiring greater due process protection" because "[a]ny liberty interest which passes *Sandin*'s [atypicality] threshold comes with a higher presumption of process due than those which may have been found pre-*Sandin*." Pet. App. 22a & n.12. The majority also weighed the value of the district court's additional procedural requirements in respondents' favor, noting the district court's "findings concerning past erroneous and haphazard placements at OSP" (*id.* at 22a) and asserting that the cost of complying with the new requirements do not "outweigh [their] probative and protective value" (*id.* at 23a). Finally, the majority acknowledged the governmental "interest in guaranteeing the safety of [prison] staff and inmates through the swift isolation of dangerous inmates," but concluded that petitioners could use administrative segregation, "which does not require extensive process," as an alternative for assuring safety. *Id.* at 22a.

Judge Rogers concurred in part and dissented in part. Pet. App. 26a-35a. Judge Rogers disagreed with the majority's "reli[ance] on *Sandin* to conclude that the liberty interest in this case is particularly weighty," explaining that "a hardship that is only marginally atypical and marginally significant should only be given marginal weight in [a *Mathews*] analysis." *Id.* at 31a. Judge Rogers stated that he would nevertheless "uphold all of the procedural requirements imposed by the district court except the requirement that officials limit their placement decision to those matters detailed in the notice to the inmate." *Id.* at 29a. That requirement, he explained, burdened petitioners with "cull[ing] through often voluminous records and not[ing] every potentially relevant fact" in the notice, but did not increase the accuracy of the decisionmaking process. *Id.* at 33a.

## SUMMARY OF ARGUMENT

Under the flexible and context-specific analysis that governs procedural due process claims, the procedures accorded

[1] The district court also required that classification hearings be recorded; prisoners receive notice of the committee's intent to rely on confidential testimony; the Warden engage in "independent review" of the committee's recommendation; the inmate be provided with notice of the Warden's reliance on any confidential witness statement not already disclosed; and no one involved in the inmate's original classification take part in the prisoner's appeal to the Warden or to the Bureau of Classification. Pet. App. 20a-21a.

to prisoners placed in Ohio's supermaximum facility are more than sufficient to satisfy the Constitution (assuming that the placement in such a facility even implicates a liberty interest that triggers due process scrutiny). Formal, trial-type procedures are not mandated; indeed, even less formal procedures than the State has adopted here are adequate, in light of the substantial deference owed to prison officials in making predictive judgments designed to maintain institutional security.

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), this Court established a framework for evaluating the sufficiency of particular procedures that weighs the "private interest" at stake against the governmental interest advanced by the challenged policy, and considers both the risk that the private interest will be erroneously deprived by the procedures provided and the burden of additional process on the government. In considering due process claims in the prison setting, the guiding principle has been one of substantial deference to prison administrators, based on the recognition that they possess superior expertise, especially with respect to issues pertaining to institutional security. See *Sandin* v. *Conner*, 515 U.S. 472, 482-483 (1995).

The court of appeals' decision rejecting Ohio's Policy 111-07 reflects a misapplication of *Mathews* and a misunderstanding of the fundamentally discretionary and predictive nature of the inmate-placement decision. First, the court placed too much weight on the liberty interest it found respondents to have in avoiding transfer to OSP. Beginning with *Meachum* v. *Fano*, 427 U.S. 215 (1976), this Court has consistently held that a prisoner possesses no liberty interest in avoiding transfer to a prison with substantially more burdensome conditions. When this Court held in *Sandin* that state action creates a liberty interest when it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *id.* at 484, it reaffirmed



*Meachum*. Thus, placement in the more burdensome conditions at OSP, compared to conditions in the general prison population, does not even implicate a liberty interest, let alone one of substantial weight. But even if such placement were to pass the *Sandin* threshold, it would mean only that there is a liberty interest to evaluate. It would not alter the strong interest of prison officials in maintaining safety and security nor erode the deference owed to the predictive judgments of prison officials.

Second, the court of appeals failed to accord sufficient weight to Ohio's compelling interest in promoting institutional security. Indeed, this Court has ranked that interest as the most fundamental responsibility of prison administrators, to whom deference is owed. *Sandin*, 515 U.S. at 482-483. In approving numerous modifications to an already extensive process that Ohio provides its inmates before placing them in OSP, the court of appeals did not pay any deference to Ohio's judgment about the best manner in which to effect an inmate placement.

Finally, the court of appeals erred in concluding that the district court's modifications—designed to aid the inmate in eliciting specific facts—would enhance the inmate-transfer decisionmaking process. The decision whether to transfer an inmate in order to promote institutional security is a fundamentally predictive judgment that turns largely on subjective evaluations of numerous factors rather than the narrow resolution of specific historical facts. The highly discretionary nature of the inmate-placement decision simply does not lend itself to the type of rigid procedures that the courts below imposed.

Indeed, even more informal procedures than employed by Ohio are constitutionally sufficient. BOP effects the transfer of some inmates with chronic behavioral problems into its highest-security prisons without the formal hearing procedures called for by the court of appeals. Like Ohio, BOP has

a three-tiered recommendation and review process for inmate transfers to USP Marion and to ADX Florence (other than the Control Unit). Unlike in Ohio, however, the inmate does not directly participate in that process. Instead, the inmate may challenge a placement decision through the administrative remedy program. See 28 C.F.R. 542.10 *et seq.* That procedure provides the inmate with an after-the-fact formal appeal process. BOP's informed judgment that it promotes sound prison management to make inmate-transfer decisions in this manner supports Ohio's position that the court-imposed modifications requiring even greater inmate participation in the placement process will burden the placement decision without providing any concomitant benefit.

## ARGUMENT

### OHIO'S PROCEDURES FOR PLACEMENTS IN ITS SUPERMAXIMUM FACILITY ARE MORE THAN ADEQUATE TO SATISFY DUE PROCESS

It is settled that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 569 (1972). Although petitioners argued below that respondents do not have a liberty interest in avoiding placement in OSP (see Pet. App. 11a, 47a), they do not press that argument before this Court. Instead, petitioners assume *arguendo* that respondents have such an interest, but challenge the court of appeals' conclusion that the process provided is insufficient. Pet. i, 11. Respondents do not have a liberty interest in which facility they are housed based on differences in non-punitive conditions. But assuming that a liberty interest is implicated in this case, the court of appeals' holding that Ohio's procedures fail to protect it is incorrect. The cardinal principle in due process analysis is one of flexibility to take into account the relevant context, the



competing interests, and the nature of the challenged decision. Here, where the interest is one of lawfully-incarcerated prisoners in whether they are placed in a supermaximum-security facility, and the judgment requires an assessment by prison officials of a multiplicity of subjective and predictive factors about what placement will best promote institutional security, due process does not mandate any form of heightened trial-type procedures or elaborate notice-and-hearing rules. To the contrary, the fundamentally predictive decision of prison officials can be made, in compliance with the Constitution, with far less process than Ohio provides. Accordingly, the judgment of the court of appeals should be reversed.

#### I. *MATHEWS* V. *ELDRIDGE* PROVIDES THE APPROPRIATE FRAMEWORK FOR DETERMINING WHAT PROCESS IS CONSTITUTIONALLY REQUIRED TO PROTECT AN ASSERTED LIBERTY INTEREST

As the Court has repeatedly recognized, the determination of what process is due:

> generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (citing cases). Thus, any liberty interest that a prisoner has in avoiding placement at a supermaximum facility must be weighed against the prison's interest in maintaining institutional security, an interest it seeks to advance by making

placement determinations that fundamentally reflect discretionary, predictive judgments.

1. The Court's decisions in the prison context exemplify the principle that the type of process due varies substantially based on a context-specific balancing of the *Mathews* factors. In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court addressed the adequacy of the procedures employed by Nebraska officials in deciding whether to discipline inmates for misconduct by placing them in segregated confinement and revoking "good time" credits. *Id.* at 563-572. The Court held that the inmates had a state-created liberty interest in avoiding those sanctions, *id.* at 558, which could "postpone the date of eligibility for parole and extend the maximum term to be served," *id.* at 561. But the Court concluded that the Nebraska prison officials were required to apply only "some, but not all," *id.* at 571, of the formal-trial-type procedures the Court had mandated in *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972), for final parole revocations. In particular, the Court held that a prisoner facing misconduct charges must be given 24 hours' advance written notice of the charges against him; the right to call witnesses and present documentary evidence in a manner consistent with institutional security; if illiterate, staff assistance in preparing a defense; an impartial tribunal; and a written statement explaining the basis of the tribunal's decision. *Wolff*, 418 U.S. at 563-570. The Court refused, however, to require that prisoners be given counsel or the opportunity to cross-examine witnesses, citing the risk of "disruption" in allowing confrontation and noting that the insertion of counsel would "inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals." *Id.* at 568-570.

Subsequently, in a prisoner's challenge to administrative segregation, this Court rejected the contention that *Wolff* procedures were required. *Hewitt* v. *Helms*, 459 U.S. 460,



466 (1983).[2] Applying the *Mathews* framework, the Court first explained that the inmate's "private interest [was] not one of great consequence" because: "[h]e was merely transferred from one extremely restricted environment to an even more confined situation"; "the stigma of wrongdoing or misconduct d[id] not attach to administrative segregation"; and segregation would not "have any significant effect on parole opportunities." *Hewitt*, 459 U.S. at 473. The Court further explained that, by contrast, the State's interest in confining inmates in administrative segregation was of "great importance," not least because "[t]he safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." *Ibid.*

Finally, the Court focused on the nature of the challenged decision. The Court observed that "assessing the seriousness of a threat to institutional security" requires prison administrators to make "purely subjective evaluations and * * * predictions of future behavior" based not only on "the specific facts surrounding a particular incident," but also on "the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." 459 U.S. at 474. That assessment, the Court concluded, does not "involve[] decisions or judgments that would * * * be[] materially assisted by a detailed adversary proceeding." *Id.* at 473-474.

Accordingly, the *Hewitt* Court held that the prison authorities were "obligated to engage only in an informal, nonadversary review of the information supporting [the inmate's] administrative confinement * * * within a reason-

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[2] The *Hewitt* Court's antecedent methodology for identifying a protected liberty interest was rejected in *Sandin* v. *Conner*, 515 U.S. 472, 480-484 & n.5 (1995). Nevertheless, the *Hewitt* Court's application of *Mathews* remains instructive.

able time after confining him." 459 U.S. at 472.[3] The Court stated that "[a]n inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Id.* at 476.[4]

2. These cases illustrate that the requirements of due process are necessarily "flexible and variable dependent upon the particular situation being examined." *Hewitt*, 459 U.S. at 472; see *Wolff*, 418 U.S. at 560 ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.") (quoting *Cafeteria & Rest. Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961)). "[F]lexibility is necessary to gear the process to the particular need." *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (citing *Mathews*, 424 U.S. at 335).

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[3] The similarly predictive and multi-factored nature of the parole-release determination prompted the Court in *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979), to hold that the Due Process Clause did not require Nebraska to provide a formal, adversarial process. Because the parole-release determination involved "analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior," *id.* at 13, the Court concluded that "[p]rocedures designed to elicit specific facts, such as those required in * * * *Wolff*," *id.* at 14, would not enhance the decisionmaking process. As with *Hewitt*, that aspect of the Court's decision remains instructive after *Sandin*, which rejected *Greenholtz*'s methodology for identifying a protected liberty interest. See note 2, *supra*.

[4] The Court made clear that the State did not have to provide the inmate a hearing, explaining that "[o]rdinarily a written statement by the inmate" is sufficient. *Hewitt*, 459 U.S. at 476. The Court further observed that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate," and that "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates." *Id.* at 477 n.9.



In balancing the relevant factors in the prison context, the Court has stressed that "one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented * * * in a state prison." *Hewitt*, 459 U.S. at 472 (internal quotation marks omitted). The Court has also been guided by the principle that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Ibid.* (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979)). Accord *Sandin*, 515 U.S. at 482-483.

In light of this Court's emphasis on the flexibility inherent in procedural due process, *Wolff* and *Hewitt* are properly viewed not as providing the only two discrete bundles of procedures that are available for prisons, but as benchmarks that aid the determination of what process is due under the *Mathews* framework. "Thus[,] to the extent, for instance, that *Hewitt* instructs that additional procedures with respect to 'forward-looking' determinations are less likely to increase the accuracy of such decisions * * *, that guidance may appropriately be applied—not categorically but as part of the weighing—in other cases involving different procedures and different * * * interests." Pet. App. 29a (Rogers, J., concurring and dissenting). Here, although the court of appeals correctly rejected applying a "mechanistic" approach, *id.* at 18a, it erred in its application of the *Mathews* factors by assigning too much weight to the asserted liberty interest, too little weight to the State's interest in promoting long-term security in its prisons, and far too much value to the modified procedures that the district court imposed.

## II. OHIO'S PROCEDURES READILY SATISFY DUE PROCESS UNDER THE CIRCUMSTANCES

By promulgating Policy 111-07, Ohio has chosen to provide inmates who are identified as posing a serious threat to prison security with an extensive process before placing them in its highest-security facility, the OSP. That process, described in more detail below, is more than sufficient to protect whatever liberty interest a prisoner has in avoiding placement at OSP. Indeed, the States and the federal government are free to, and have, adopted a range of procedures to deal with the paradigmatic penological decision of when assignment to a supermaximum-security facility is warranted to protect prison security. A prisoner may be accorded less extensive process than Ohio has provided without violating the Constitution.

### A. The Liberty Interest Respondents Possess, If Any, In Avoiding Placement At OSP Is Not Particularly Weighty

1. It is well established that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). For this reason, even a substantial adverse change in the lawful conditions of an inmate's confinement does not by itself trigger the protection of the Due Process Clause. *Id.* at 224-225; *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976); *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460-461 (1989). Only when conditions are "qualitatively different from the punishment characteristically suffered by a person convicted of crime" has the Court held that the Due Process Clause, of its own force, creates a liberty interest requiring procedural protections. *Vitek* v. *Jones*, 445 U.S. 480, 493 (1980) (interest in avoiding transfer to mental institution); see *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990) (interest in being free from involuntary administration of psychotropic drugs).



Based on the recognition that a prisoner's liberty interests are substantially diminished by virtue of his lawful conviction and that "the decision where to house inmates is at the core of prison administrators' expertise," *McKune* v. *Lile*, 536 U.S. 24, 39 (2002) (plurality opinion), this Court has repeatedly held that the decision to transfer an inmate to a more restrictive facility does not trigger a liberty interest under the Due Process Clause. As the Court explained in *Meachum* in rejecting the claim that the State's transfer of prisoners to a maximum-security institution implicated the Due Process Clause, there is no liberty interest protecting against "transfer from one institution to another within the state prison system." 427 U.S. at 225. That is because "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Ibid.* Accordingly, the disagreeable nature of life in another institution with "more severe rules" does not mean, in itself, that a liberty interest is implicated. *Ibid.* See *Montanye*, 427 U.S. at 242 ("The [Due Process] Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive."); *Olim* v. *Wakinekona*, 461 U.S. 238, 248 (1983) ("The reasoning of *Meachum* and *Montanye* compels the conclusion that an interstate prison transfer, * * * does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself."); *Greenholtz*, 442 U.S. at 11 ("[T]he inmate's hope that he will not be transferred to another prison, * * * is not protected by due process.").

A line of post-*Meachum* cases emphasized dictum in *Meachum* to suggest that the State itself could create a liberty interest cognizable under the Due Process Clause by limiting the discretion of prison authorities to effect a prison

transfer. See 427 U.S. at 228; *Montanye*, 427 U.S. at 243; *Olim*, 461 U.S. at 249. This Court rejected this "dictum in *Meachum*" in *Sandin*, 515 U.S. at 479, and changed the methodology for determining whether a State has created a liberty interest. Rather than focus on the wording of state laws to determine whether that language has created an enforceable interest, the *Sandin* Court held that it would look to whether the State has "created an interest of 'real substance,'" *id.* at 480, by imposing a "restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *id.* at 484 (internal citations omitted).[5] Nothing in *Sandin*'s rejection of the focus on mandatory or discretionary regulations signals any retreat from the Court's consistent recognition that transfers between institutions of varying security does not create a liberty interest.

2. The court of appeals here held that transfer to OSP "constitutes an atypical and significant hardship under *Sandin*," because the conditions there are more burdensome than the conditions at other Ohio prisons, including for segregated inmates. Pet. App. 14a. The court observed that placement at OSP "is indefinite and reviewed only annually"; deprives prisoners "of all significant human contact"; and renders them "ineligible for parole." *Id.* at 21a. It is not at all clear, however, why a transfer from one high-security prison in Ohio to OSP clears *Sandin*'s threshold test, in light of *Sandin*'s reaffirmance of the holding in *Meachum* that

[5] Applying this methodology, the Court held that a Hawaii prisoner's placement in disciplinary segregation was not atypical because it "mirrored" the conditions of administrative confinement and because it did not "inevitably affect the duration of his sentence." *Sandin*, 515 U.S. at 486-487.



transfer to a higher-security prison does not implicate a liberty interest. *Sandin*, 515 U.S. at 483 (*Meachum* "correctly established and applied" due process principles); *id.* at 483 n.5 (noting that the abandonment of the *Hewitt* methodology did not require overturning the result in *Olim* where no liberty interest was found).[6] Nor does the fact that placement at OSP renders an inmate ineligible for parole necessarily create a liberty interest, because an inmate being considered for placement in OSP is unlikely to be found to deserve parole, *i.e.*, release into free society on the premise that the prisoner does not pose a continuing threat to public safety.

But even assuming for purposes of this case that Ohio has created a liberty interest, the court of appeals erred in concluding that that interest must "necessarily be of a weight

[6] Although *Meachum* involved a maximum-security facility rather than a "supermaximum" facility, the fact that the highest-security facility in a typical State is more restrictive than thirty years ago does not make it "atypical." While solitary confinement is undoubtedly different from other modes of confinement, see Brief for the United States as Amicus Curiae at 22 n.15, *Meachum* v. *Fano*, No. 75-252, *supra*, the proliferation of supermax facilities in the last twenty years to address the security needs of prisons nationwide demonstrates that today twenty-three hour lockdown for a substantial period of time is not "atypical." See Riveland, *supra*, at 2, 3; see also *Miller* v. *Henman*, 804 F.2d 421, 422-423 (7th Cir. 1986) (rejecting prisoner's claim that Due Process Clause requires hearing before transfer to USP Marion in part because that prison, where "prisoner is confined to his cell most of the day" and is "apt to be chained and closely guarded" when not so confined "is not 'qualitatively different from the punishment characteristically suffered by a person convicted of crime' ") (quoting *Vitek* v. *Jones*, 445 U.S. 480, 493 (1980)), cert. denied, 484 U.S. 844 (1987)); *Ajaj* v. *Smith*, No. 03-7874, 2004 WL 1663968 (4th Cir. 2004) (108 Fed. Appx. 743) (unpublished) (per curiam) (prisoner has no protected liberty interest in avoiding transfer to ADX Florence); *Thomas* v. *Gunja*, No. 03-1129, 2004 WL 2044311, at *2 (10th Cir. 2004) (110 Fed. Appx. 74) (unpublished) ("Plaintiff's transfer from USP Terre Haute to USP Florence did not impose atypical and significant hardship on Plaintiff in relation to the ordinary incidents of prison life.").

requiring greater due process protection" merely because it passes the *Sandin* threshold. Pet. App. 22a. First, *Sandin* speaks to whether or not an asserted liberty interest that does not arise from the Due Process Clause "of its own force" (515 U.S. at 484) receives *any* protection, but says nothing about the relative weight to assign a liberty interest that crosses the *Sandin* threshold. Second, the fact that a liberty interest is cognizable under the *Sandin* standard, as the court of appeals found here, but not under the Due Process Clause "of its own force," supports attributing that interest *less* weight, not more, when conducting the balancing required by *Mathews*.

Finally, even assuming a *Sandin*-based liberty interest is weighty, it does not necessarily follow that "greater" process is automatically due. That interest must still be balanced against the State's interest and evaluated in light of the nature of the challenged decision and the value and cost of additional process. The Court made this point clear in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 86 (1978), in which it held that a medical student who suffered a more severe deprivation than the suspended high-school students in *Goss* v. *Lopez*, 419 U.S. 565 (1975), was entitled to "far less stringent procedural" protection. See pp. 23-24, *infra* (discussing *Horowitz*).

**B. Petitioners' Interest In Ensuring The Safety And Security Of Inmates And Prison Staff Is Compelling**

The principal governmental interest in housing dangerous inmates at OSP is ensuring the safety of prison officials and inmates throughout the Ohio prison system. As this Court has emphasized, that concern is "perhaps the most fundamental responsibility of the prison administration" and entitled to great weight in the *Mathews* balancing. *Hewitt*, 459 U.S. at 472. Here, that interest is of particular importance. The State built OSP in response to a riot at what had



previously been its most secure prison facility. Pet. App. 2a; *cf.* Riveland, *supra*, at 5 ("In 1983, the deaths of two officers and an inmate resulted in [USP Marion's] conversion to indefinite administrative segregation, or lockdown."). More generally, supermax placements have responded to the intractable security problems posed by some inmates in even maximum-security prisons, which lack the specialized facilities and trained personnel available in supermax institutions.

The court of appeals improperly discounted petitioners' interest in promoting institutional security based on its conclusion that petitioners have an alternative "mechanism to assure safety, one which does not require extensive process, and which * * * is easily and swiftly reversible in the case of error: administrative segregation." Pet. App. 22a. That conclusion ignores that Ohio has made a judgment that transfer of disruptive prisoners to OSP serves the *long-term* interest in prison security. A series of interim placements may, in the judgment of prison administrators, create uncertainty and exacerbate any problems in prisoner adjustment to a new facility. That judgment is undoubtedly entitled to deference by the courts, see, *e.g.*, *Hewitt*, 459 U.S. at 472 (decisions regarding institutional security entitled to "wide-ranging deference"), which should not lightly substitute a different view that short-term measures to enhance prison security are adequate to meet the prison's needs, cf. *Overton* v. *Bazzetta*, 539 U.S. 126, 136 (2003) (reasonableness of regulation can be undermined by regulatory alternative only where that alternative, *inter alia*, does not impose "more than a *de minimis* cost to the valid penological goal").

**C. The Court-Imposed Procedures Will Not Substantially Reduce The Risk Of Error In Petitioners' Placement Decisions**

Ohio's Policy 111-07 affords inmates placed at OSP with more than sufficient process in light of the interests dis-

cussed above and the forward-looking and quintessentially discretionary nature of the inmate-transfer decision. Indeed, sound determinations in such prisoner-assignment decisions can be made without as elaborate a process as Ohio provides—as is demonstrated by a comparison to procedures used in the federal system.

1. Policy 111-07 establishes a three-tiered recommendation and review process for determining whether an inmate should be housed at OSP. The policy goes beyond the procedures approved by the Court in *Hewitt* by providing inmates with advance notice of the classification committee hearing and with the opportunity to be heard both in front of the committee and in writing after the Warden makes his placement recommendation to the Bureau of Classification. Pet. App. 127a-130a. Policy 111-07 also provides substantial process for OSP retention determinations. Each inmate's classification is reviewed within 30 days after he arrives at OSP and thereafter at least annually. Pet. App. 131a-132a, 137a-140a. Inmates are provided with advance notice of their "Annual Supervision Review" and with the opportunity to be heard both during the hearing and after the Warden makes his recommendation to the Bureau of Classification. *Id.* at 139a-140a.

The value of the additional requirements imposed by the district court "'would be too slight to justify holding, as a matter of constitutional principle[,]' that they must be adopted." *Hewitt*, 459 U.S. at 476 (quoting *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975)). The courts below principally mandated that Ohio supplement its process by: (1) providing inmates with an advance written notice that includes "an exhaustive list of the reasons to be considered for placement" and the evidence prison officials intend to rely on, on pain of barring prison officials from considering grounds or evidence not identified; (2) allowing inmates to call witnesses and present documentary evidence unless security interests would



be unduly compromised; (3) insisting that prison officials disclose as much information as possible about any testimony from confidential witnesses relied on; and (4) requiring decisionmakers to provide extensive written reasons for their decisions. Pet. App. 20a-21a. Those formal measures are out of place in the prisoner-transfer context and will not enhance decisionmaking.

Although the court of appeals noted that petitioners' regulations allow OSP placement "only in the presence of certain factual predicates" (Pet. App. 23a), review of Policy 111-07 makes clear that the decision is, at bottom, a predictive determination about the long-term security risk posed by the inmate that "turns largely on 'purely subjective evaluations and on predictions of future behavior.'" *Hewitt*, 459 U.S. at 474 (quoting *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 464 (1981)). As this Court has explained, such assessments "necessarily draw on more than the specific facts surrounding a particular incident" because prison officials "must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." *Ibid.*; see *Meachum*, 427 U.S. at 225 ("Transfers between institutions * * * are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate."); Riveland, *supra*, at 9 ("Diagnosis, prediction, risk assessment, and identification of causal factors to violent acting out often defy objective criteria and invite a significant degree of subjectivity.").

Even outside the prison context, this Court has emphasized the distinction between decisions premised on fundamentally predictive judgments as opposed to the retrospective resolution of factual disputes. For example, in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), the Court held that a student dismissed from

medical school was not entitled to a hearing, because the school officials' judgment "that she did not have the necessary clinical ability to perform adequately as a medical doctor" was "by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision." *Id.* at 89-90. The Court added that the decision at issue "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90. In so holding, the Court "fully recognize[d]," *id.* at 86 n.3, that it had required greater process for a less severe deprivation in *Goss*, where the Court held that due process required that high-school students facing a ten-day suspension for disciplinary reasons be given notice and an opportunity to be heard.

Contrary to the court of appeals' assertion (Pet. App. 23a), nothing in Policy 111-07 "restrict[s]" petitioners' authority to consider subjective factors and to exercise experience-based judgments in deciding whether an inmate should be housed at OSP. In fact, the policy specifically requires the classification committee to "determine whether the inmate has met one of the [listed] criteria *and* whether the inmate should be placed in Level 5" (*id.* at 129a-130a) (emphasis added), thus making clear that the "factual predicates" referred to by the court of appeals, *id.* at 23a, are not the only factors to be considered and do not automatically trigger placement in OSP. Further, the portion of Ohio's policy addressing annual retention reviews lists numerous non-historical considerations and requires the committee to use its "professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions." *Id.* at 138a-139a.[7]

[7] The court of appeals' focus on the details of the regulations and the restriction on the discretion of prison officials under the regulations essentially reintroduces the erroneous methodology this Court rejected in *Sandin*. The decision where to house an inmate is inherently discretionary and predictive. Even if that discretion is channeled through regulations that make historical facts relevant, that does not change the fundamental nature of the decision or give rise to additional constitutional protections.



Because petitioners' placement decisions ultimately turn on subjective judgments about prison management rather than on specific, disputed facts, "procedures designed to elicit specific facts," *Greenholtz*, 442 U.S. at 14—such as the requirements that inmates be allowed to call "reasonable witnesses" (Pet. App. 40a) and that they receive notice of "all the grounds believed to justify * * * placement" at OSP (*ibid.*) and "a detailed and specific justification" for each placement recommendation and decision (*id.* at 42a)—are unlikely to reduce the risk of erroneous placement decisions. See *Greenholtz*, 442 U.S. at 14 (formal hearing on highly discretionary parole-release decision "would provide at best a negligible decrease in the risk of error"). Instead, such requirements "would tend to convert the process into an adversary proceeding," *id.* at 15-16, and would threaten to hinder prison officials by encouraging them to focus on "mechanically complying with cumbersome, marginally helpful procedural requirements, rather than managing their institution wisely," *Hewitt*, 459 U.S. at 474 n.7.

2. The reasonableness of Ohio's procedures is underscored by comparing them to the Bureau of Prisons (BOP). In the federal system, inmates are housed at ADX Florence and USP Marion in conditions that are substantially comparable in the level of restriction to those at OSP. BOP's placement policy, however, differs from Ohio's in certain respects, the most salient being that a federal inmate does not receive a hearing before the placement decision (other than in the Control Unit). BOP's judgment that hearing from the inmate before the placement decision is unnecessary to en-

sure an effective placement policy supports Ohio's contention that the court-imposed modifications to Policy 111-07 will not enhance the quality of inmate-placement decisions. BOP's criteria for transfer are somewhat more general than Ohio's. For example, BOP's inmate-transfer policy provides that ADX Florence is "for those inmates who have demonstrated an inability to function in a less restrictive environment without being a threat to others, or to the secure and orderly operation of the institution." *BOP Program Statement No. 5100.07, Security Designation and Custody Classification Manual*, Ch. 10 (Jan. 31, 2002) (*Program Statement*) § 3(a)(1). And USP Marion "is reserved for inmates who have demonstrated an inability to adjust satisfactorily to general population units in other secure facilities." *Program Statement* § 3(a)(2).[8]

Although BOP, like Ohio, has a three-tiered review process for effecting an inmate's transfer to those facilities, the inmate does not directly participate in it unless and until the inmate challenges the decision in an administrative appeal. BOP makes placement decisions for its high security housing units through a process that is similar to its general classification and transfer procedures.[9]

BOP's policy provides that the Warden may propose an inmate transfer to Florence or Marion only "[i]f transfer to another institution is not appropriate[.]" *Program Statement* § 3(a)(3). The Warden must refer a transfer proposal to the Regional Director, whose concurrence is necessary for

[8] Like Ohio, BOP does not seek to transfer "[i]nmates currently diagnosed as suffering from serious psychiatric illnesses." *Program Statement* § 3(a)(3).

[9] Congress has given BOP broad discretion to make prisoner placement and transfer decisions, see 18 U.S.C. 3621(b); S. Rep. No. 225, 98th Cong., 1st Sess. 142 (1983), and has exempted such decisionmaking from judicial review under the Administrative Procedure Act, see 18 U.S.C. 3625.



the proposal to reach the North Central Regional Director, who makes the final decision. *Ibid.* The North Central Regional Director bases the transfer decision on consideration of the "referral packet," which must include "[a] memorandum from the Warden to the appropriate Regional Director with the specific rationale supporting the institution's recommendation"; "[c]opies of all disciplinary reports, investigative materials or other official documentation related to the behavior prompting the referral"; "[a] current Progress Report"; "the inmate's latest Presentence Investigation Report"; "[a] recent psychiatric or mental health evaluation" and "[a] memorandum from the Regional Director recommending the referral." *Program Statement* § 3(a)(4). The North Central Regional Director must document the final decision in a memorandum to the requesting Regional Director and Warden. *Program Statement* § 3(a)(5).[10]

Although the inmate does not directly participate in that referral process, he is apt to be familiar with the concerns prompting the referral, because he has the opportunity to communicate with his assigned Unit Team and he receives regular Program Reviews at which problems are discussed. See 28 C.F.R. 524.11 and 524.12. Moreover, an inmate may challenge a transfer decision via the Administrative Remedy Program. See 28 C.F.R. 542.10-542.19. That program provides the inmate with a formal administrative appeal process before the Warden, the Regional Director, and the National Inmate Appeals Administrator in BOP's Central Office, Washington, D.C.

Due process does not invariably require an opportunity to be heard in advance of a decision. See *Hewitt*, 459 U.S. at 476 & n.8 (providing inmate opportunity to be heard orally or

[10] The North Central Regional Director has the authority to place an inmate referred to USP Marion in ADX Florence and vice versa. *Program Statement* § 3(a)(5).

in writing within reasonable time after decision to place him in administrative segregation suffices); cf. *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988) (bank officer deprived of property interest by suspension not entitled to be heard until within reasonable time after suspension). Here, BOP has a strong interest in institutional safety and security, and reasonably concluded that a thorough administrative consideration, typically based on reports and records generated with information from the inmate (such as mental health evaluations, presentence reports, progress reports, and disciplinary reports), followed by a post-assignment opportunity for a prisoner to respond and be heard, provides sufficient process.[11]

BOP's longstanding judgment that prisoner placement decisions should be carried out by an administrative process involving prison officials, followed by an opportunity for a prisoner to be heard in an administrative appeal, demonstrates that formal, trial-type procedures are unnecessary to ensure sound decisionmaking in the interest of institutional security. The court of appeals' decision approving the district court's modifications of Ohio's already highly detailed set of procedures constitutes a misapplication of the *Mathews* factors to a decisionmaking process that should be left largely, if not entirely, to prison administrators.

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[11] To the extent a placement decision is based in part on disciplinary violations—the accumulation of which is a common basis for transfer—the inmate would have had an opportunity to challenge the finding of any such violations under the procedures set out in *Wolff*. See 28 C.F.R. 541.10-541.20.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# In The Supreme Court of the United States

REGINALD WILKINSON, et al.,

*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF THE STATES OF CALIFORNIA, ALASKA, ARIZONA, COLORADO, DELAWARE, HAWAII, ILLINOIS, MAINE, MISSOURI, NEBRASKA, NEVADA, OKLAHOMA, OREGON, SOUTH CAROLINA, TEXAS, WASHINGTON, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Where state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in *Hewitt v. Helms*, 459 U.S. 460 (1983), satisfy the prisoner's due process rights?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| INTEREST OF THE *AMICI CURIAE* | 1 |
| SUMMARY OF THE ARGUMENT | 2 |
| ARGUMENT | 4 |
| I. AN INMATE WHO IS CONSIDERED FOR "SUPERMAX" HOUSING RECEIVES DUE PROCESS IF PRISON OFFICIALS ENGAGE IN AN INFORMAL, NONADVERSARY REVIEW OF THE INFORMATION SUPPORTING THE PLACEMENT, INCLUDING WHATEVER STATEMENT THE INMATE WISHES TO SUBMIT | 4 |
| A. Supermax-housing decisions are subjective in nature, considering myriad factors relevant to predicting an inmate's threat to security | 4 |
| 1. Prisons are inherently dangerous, and they present intractable security challenges | 4 |
| 2. Many states have established supermax facilities to meet the high-security needs of the nation's most-dangerous prisoners | 6 |
| 3. Supermax-placement decisions depend on the valuable expertise of prison officials for the identification of inmates who present excessive security risks | 9 |




TABLE OF CONTENTS – Continued


| | Page |
|---|---|
| B. The intrinsic flexibility of the Due Process Clause allows predictive and subjective decisions to be made within the constructs of informal, nonadversary proceedings, especially when important penological interests are implicated | 11 |
| C. Because supermax-housing decisions turn on security-risk assessments that are subjective and predictive, due process is satisfied through informal, nonadversary proceedings | 15 |
| 1. The nature of subjective supermax decisions is identical to the nature of decisions in the parole and administrative-segregation contexts | 15 |
| 2. The balance of the individual and governmental interests do not warrant a departure from the informal, nonadversary process that is appropriate for subjective, predictive determinations as previously addressed by the Court | 19 |
| D. The more-adversary procedures required by the Sixth Circuit are ill matched to subjectively oriented supermax decisions and impose unnecessary burdens on prison administrators | 22 |
| CONCLUSION | 26 |

## TABLE OF AUTHORITIES

Page

CASES

*Armstrong v. Manzo*, 380 U.S. 545 (1965) ..... 11

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## TABLE OF AUTHORITIES – Continued

Page

*United States v. Santiago*, 46 F.3d 885 (9th Cir. 1995) ..... 6

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James J. Stephan & Jennifer C. Karberg
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Jennifer Warren
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TABLE OF AUTHORITIES – Continued

Page

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## INTEREST OF THE *AMICI CURIAE*

One of the essential functions of states is to securely house criminals in a manner that will protect not only the public, but also prison staff and inmates within the close and dangerous confines of prison. In order to fulfil this difficult responsibility, many states have created super-maximum-security housing for their most-dangerous prisoners, who are identified based on an evaluation of myriad factors concerning their inmate history, as well as a thorough understanding of the inherent dangers of prisons. In this respect the decision to place an inmate in "supermax" housing is both subjective and predictive, based on officials' expertise in managing prisons and their keen awareness of the highly volatile prison atmosphere.

The *amici* states object to the Sixth Circuit's imposition of formalistic and unduly burdensome procedures onto these determinations. The Due Process Clause's intrinsic flexibility allows these decisions to be made appropriately and efficiently through informal, nonadversary review, as this Court deemed constitutionally sufficient in the parole-suitability context, *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), and in security-based administrative segregation decisions, *Hewitt v. Helms*, 459 U.S. 460 (1983). Informal, nonadversary procedures prevent the unnecessary encumbering of correctional administration. And they steer the focus of supermax hearings away from particular factual disputes and onto the more-important inquiry: whether an inmate's overall history, attitude, and associations with other inmates indicate an excessive security threat.

## SUMMARY OF THE ARGUMENT

Super-maximum-security facilities have become common among the states over the last twenty years, as part of a response to the serious danger that some of the nation's most-violent prisoners pose to the security of general-population prisons. These facilities provide a very high degree of control and allow the employment of specially crafted security measures in order to stem the opportunities for inmates to use violence against prison staff and other inmates.

The decision to place an inmate into supermax housing for predictive, non-punitive security reasons is necessarily subjective in nature. Officials may take into consideration many different factors, including: the nature of the commitment offense; the inmate's complete prison record, attitude, and associations with other inmates (including any gang associations); and the current atmosphere of the prison. Then a determination is made whether the inmate presents such a high threat to safety that he cannot be housed in traditional high-security facilities.

The intrinsic flexibility of the Due Process Clause allows subjective and predictive decisions like those here to be made within the constructs of informal, nonadversary proceedings—especially when important penological interests are at issue. Indeed the Court has upheld such proceedings in both the parole-suitability context, *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), and in regard to security-based decisions to place inmates into temporary administrative segregation, *Hewitt v. Helms*, 459 U.S. 460, 476 (1983).

The Sixth Circuit's holding that such "supermax" decisions can only be made if an inmate is afforded factually oriented procedural protections is out of step with this



Court's precedent and the purpose of the Due Process Clause itself. The procedural requirements announced by the Sixth Circuit (such as factually specific notice to the inmate, an opportunity to call witnesses, and a factually specific decision) were modeled after the process required for prison-disciplinary decisions, as announced in *Wolff v. McDonnell*, 418 U.S. 539 (1974). While the *Wolff* procedures are appropriate for a retrospective determination of fact, they are not entirely appropriate for decisions that are subjective and predictive in nature. The Sixth Circuit's prescription for factually oriented procedural requirements will not substantially aid in the accuracy of supermax-housing decisions. Rather, they will encumber prison officials with detailed and time-consuming tasks, contribute to an adversarial atmosphere, and even confuse inmates about the nature of the decision to be made. And all this will come at the further expense of burdening already scarce prison resources.

For these reasons, sufficient process may be provided in supermax-housing determinations through an informal, nonadversary review process as envisioned in this Court's decisions in *Greenholtz* and *Hewitt*. Such process will ensure that an inmate receives an opportunity to participate in the review of his records and to explain any special circumstances that may affect the inquiry. And it will not unduly burden officials' ability to make efficient and accurate security decisions.

## ARGUMENT

### I. AN INMATE WHO IS CONSIDERED FOR "SUPERMAX" HOUSING RECEIVES DUE PROCESS IF PRISON OFFICIALS ENGAGE IN AN INFORMAL, NONADVERSARY REVIEW OF THE INFORMATION SUPPORTING THE PLACEMENT, INCLUDING WHATEVER STATEMENT THE INMATE WISHES TO SUBMIT.

#### A. Supermax-housing decisions are subjective in nature, considering myriad factors relevant to predicting an inmate's threat to security.

This case asks what procedures an inmate is entitled to under the Due Process Clause when he is considered for supermax housing. This question should not be separated from the real-life background that informs the decisions at issue. Rather, it should be framed with an understanding of the safety issues that demand officials' necessarily subjective, yet expertly informed judgment in supermax-housing decisions.

##### 1. Prisons are inherently dangerous, and they present intractable security challenges.

By their very nature, prisons are tense at best, sometimes explosive, and always potentially dangerous. *Marchesani v. McCune*, 531 F.2d 459 (10th Cir. 1976). For they are populated by those who have a demonstrated proclivity toward antisocial, criminal, and violent conduct. *See Hudson v. Palmer*, 468 U.S. 517, 526 (1984). For these reasons, prison staff and inmates themselves are faced with the constant threat of physical danger. Indeed, California was tragically reminded of this unfortunate



reality recently when one of its correctional officers—a sixteen-year correctional veteran, a husband, and father of five—was violently stabbed and killed by an inmate with apparent gang ties. Jennifer Warren, *Prison Guard Is Stabbed to Death*, Los Angeles Times, January 11, 2005, at B1. Regrettably, violent assaults against correctional staff are shockingly frequent. A census of state and federal correctional facilities revealed that in 2000, there were 17,952 prisoner assaults against staff, an incidence of 14.6 assaults per 1000 inmates. James J. Stephan & Jennifer C. Karberg, Census of State and Federal Correctional Facilities, 2000, at 10 (2003). Five of these assaults resulted in staff deaths. *Id.* Inmates themselves also face a great risk of violence by other prisoners. In 2000, for instance, 34,355 inmates were assaulted, 28 out of 1000, with 51 deaths. Stephan & Karberg, *supra*, at 10. Often, such incidents between inmates or between inmates and staff unfold into riots, of which there were 1,334 in U.S. prisons from 1990 to 1995. Reid H. Montgomery, Jr., Ph.D. & Gordon A. Crews, Ph.D., A History of Correctional Violence: An Examination or Reported Causes of Riots and Disturbances 68, 72-73 (1998). Other precipitating factors of riots are diverse and include racial tension, mass escape attempts, dissatisfaction with prison food, alcohol and drug-related issues, gangs, and even rumors. *Id.* at 68. Such riots frequently involve dozens, even hundreds of inmates. *Id.* at 79-80. Most last for many hours, and many span days. *Id.* at 77-78. They often involve hostages being taken, and usually result in significant property damage at a minimum. *Id.* at 80-81.

One of the greatest recent challenges in managing the danger of prisons is gang activity. "Anyone familiar with prisons understands the seriousness of the problems

caused by prison gangs that are fueled by actively virulent racism and religious bigotry. Protecting staff from prisoners and prisoners from each other is a constant challenge." *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996). The prison-gang culture is extremely violent: "It includes forced prostitution and armed robbery. It also includes the violence necessary for its enforcement such as attacks on prisoners who interfere with prostitution or tell secrets." Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law after Twenty-five years 1962-1987*, 37 Am. U. L. Rev. 41, 61-62 (1987). In fact, it is commonly known that some gangs require one inmate to kill another in order to become a gang member. *See United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1995); *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 1984); *see also* David Grann, *The Band: How the Aryan Brotherhood became the most murderous prison gang in America*, The New Yorker 156 (Feb. 16 & 23, 2004).

Prison officials face these troubling realities daily. No easy solutions are evident, yet officials are charged with the task of minimizing, to the extent possible, the threat of violence in order to protect the public, prison staff, and inmates themselves.

**2. Many states have established supermax facilities to meet the high-security needs of the nation's most-dangerous prisoners.**

In response to such concerns, prison officials historically have placed violent or otherwise disruptive inmates into separate housing units, generally called segregation. *See* Chase Riveland, Supermax Prisons: Overview and General Considerations 1 (1999). But in recent years,



there has emerged a trend toward devoting entire facilities to supermax confinement—highly restrictive and controlled housing utilized for the highest-risk inmates. LIS, Inc., Supermax Housing: A Survey of Current Practice 3-6 (1997). At least thirty states and the federal government operate supermax facilities, with the overwhelming majority of them having opened in the 1980's and 1990's. *See id.*

Because the term "supermax" is often applied to a wide variety of facilities and programs, which handle an equally wide variety of inmate populations among the states, it is difficult to precisely define what a supermax facility is. Yet the following is a generalized definition that fits well within the issues of this case, given that its terms do not encompass disciplinary housing:

> [A] free-standing facility, or a distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated. Such inmates have been determined to be a threat to safety and security in traditional high-security facilities, and their behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.

LIS, Inc., *supra*, at 1.

The high degree of control in these facilities, combined with the ability to devote highly qualified and trained staff to monitor the inmates concentrated there, allows administrators to significantly restrict the ability of these inmates to harm other prisoners or staff. *See* Riveland, *supra*, at 16-18. In addition, the concentration of troublesome inmates

allows easier, safer management of general-population prisons. *See id.* at 1.

In supermax units, almost every aspect of inmates' lives is tightly controlled and documented. Riveland, *supra*, at 15. Much is invested into making the buildings themselves extremely secure through the use of "enhanced and extensive security features on locks, doors and perimeters; reinforced walls, ceilings, and floors; and, frequently, the incorporation of advanced electronic systems and technology." *Id.* at 1-2. Many agencies provide specialized training relevant to dealing with such high-risk inmates, and they focus on assigning to the facilities only those officers who have the physical ability, maturity, intelligence, and good judgment to deal with these inmates daily. *See id.* at 16-18; LIS, Inc., *supra*, at 4.

Still, grouping all such facilities under the one term, "supermax," is somewhat misleading because it ignores the many differences in the operation and physical characteristics of these facilities among the states. Indeed, states themselves distinguish their programs by calling them by many different names, including, to name only several: special housing unit, maxi-maxi, maximum control facility, secured housing unit, intensive housing unit, intensive management unit, and administrative maximum penitentiary. Riveland, *supra*, at 5.

Beyond the variety of names, however, there are further, more-fundamental differences. For example, there is variance in the length of time that inmates are held in supermax housing, as well as whether the terms are determinate or indeterminate. Riveland, *supra*, at 4. States have fashioned the physical characteristics of supermax facilities and the prerequisites for housing



inmates in them based on localized needs. *See id.* Thus, some states report no need for supermax beds, while others report a need of up to 20% of their total capacity. *Id.* And while most states allow inmates to be paroled or released from prison while they are still in supermax housing, some do not. LIS, Inc., *supra*, at 4.

### 3. Supermax-placement decisions depend on the valuable expertise of prison officials for the identification of inmates who present excessive security risks.

The predictive determinations at issue in this case are necessarily subjective in nature, regardless of whether regulations may guide officials to focus on particular factors. For example, when Ohio evaluates a prisoner for supermax housing, it first scores him according to a fixed set of factors including: age, severity of the offense triggering the initiation of reclassification hearings, prior prison experience, prior violent behavior, pre-prison gang activity, and escape attempts. *Austin v. Wilkinson*, 372 F.3d 346, 351 (6th Cir. 2004). Yet even if an inmate scores as a low risk under these factors, officials may override the score on any of several grounds, some of which are entirely subjective and broad reaching. *Id.* Specifically, two seemingly catch-all provisions allow supermax placement if the inmate has either "a chronic inability to adjust to a lower security level" or "an ability to compromise the integrity of [prison] staff." *Id.* Such determinations can be nothing but subjective, and they appear to encompass an extensive range of concerns.

Other states, like California, have more-freeform guidelines, which simply allow non-disciplinary supermax confinement if an inmate is "deemed to be a threat to the safety of others or the security of the institution." Cal. Code Regs., tit. 15, § 3341.5(c)(1) (2003). Although the regulations specifically define validated prison-gang members and associates to qualify under this definition, the choice is otherwise entirely left to the officials' discretion. *Id.*

Thus, prison officials, at least under similar regulations, are permitted to exercise their expert judgment broadly when deciding whether an inmate's presence in a less-secure and less-controlled environment poses a high security risk. The decision may be based on any number of factors, and rightfully should include consideration of the inmate's entire record, his attitude, and his associations with other inmates.

This Court has recognized that prison officials are entitled to great deference in making such decisions because they are well acquainted with the nature of prisoners and the particularities of prison management. *See Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979). Preserving internal order and discipline requires "expertise, comprehensive planning, and the commitment of resources," which prison officials are best positioned to provide. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). Moreover, this deference is mandated by the constitutional principles of federalism and separation of powers. *See Bell*, 441 U.S. at 548.



### B. The intrinsic flexibility of the Due Process Clause allows predictive and subjective decisions to be made within the constructs of informal, nonadversary proceedings, especially when important penological interests are implicated.

The requirements of due process are not strict and inflexible, but instead vary as to time, place, and circumstance. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). What is constant is that when a protected liberty interest is implicated in any given context, whatever procedures are afforded must provide an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Davis v. Scherer*, 468 U.S. 183, 202 (1984) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Whether particular procedures provide such an opportunity is determined by the balancing test described by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 341-48 (1976). It considers three factors: the individual's interest at stake, the value of available procedural requirements, and the governmental interests involved.

The *Mathews* test is designed in view of the Due Process Clause's intrinsic flexibility. It acknowledges that there is often more than one way by which to provide due process in any given context—a flexibility that allows for experimentation among the states. *See Gerstein v. Pugh*, 420 U.S. 103, 123 (1975). And it recognizes the penological environment's unique needs, which affect the balance of the competing individual and governmental interests. *See Wolff v. McDonnell*, 418 U.S. 539, 560 (1974). For instance, individuals who have been convicted of a crime and sentenced to a term of incarceration are those who should expect their rights to be most restricted. *See Pell v. Procunier*, 417

U.S. 817, 822 (1974). At the same time, the nature of the government's interests are paramount, as the goal is to prevent the prisoner from inflicting further harm on society. *See Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

In applying the *Mathews* balancing test, this Court has affirmed that informal, nonadversary proceedings sufficiently protect due-process rights in the context of subjective and predictive decisions, especially those that implicate penological interests. For example, in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), this Court held that when an inmate has a protected liberty interest in discretionary parole, the Due Process Clause is satisfied if he participates in a properly noticed, informal parole-suitability hearing. At issue there was the adequacy of process that the state provided to inmates in yearly initial-review hearings for parole consideration. *Id.* at 4. At the initial-review hearing, the parole board reviewed "the inmate's entire preconfinement and postconfinement record." No evidence was introduced, but the board interviewed the inmate and considered "any letters or statements that he wishe[d] to present in support of a claim for release." *Id.* At that point, the board could deny parole or send the inmate on for a formal hearing, at which the inmate could present evidence, call witnesses, and be represented by private counsel of his choice. *Id.* at 4-5. The court of appeals had ruled that due process required a formal hearing for every inmate and that the board's decision must include a statement of the evidence relied upon. *Id.* at 14.

This Court reversed, however, holding that it was sufficient that the inmate was given timely notice of the initial hearing, at which he was provided an opportunity "to insure that the records before the Board are in fact the



records relating to his case" and "to present any special considerations demonstrating why he is an appropriate candidate for parole." *Id.* at 15. These procedures alone were constitutionally sufficient, and they did not require the board "to specify the particular 'evidence' in the inmate's file or at his interview" on which it based its decision. *Id.* The Court recognized that an inmate's interest in parole is substantial, but nonetheless held that to require more-adversary procedures would detract from the predictive and subjective nature of the board's decision, which was essential to addressing the serious safety concerns at issue. *See id.* at 16 (describing the decision as "essentially an experienced prediction based on a host of variables").[1]

This Court has also held that informal, nonadversary process is sufficient when an inmate is administratively segregated for the protection of institutional security. In *Hewitt v. Helms*, 459 U.S. 460 (1983), a Pennsylvania inmate had been placed in segregation for seven weeks due to suspicion that he was involved in an inmate uprising. *Id.* at 463-64. The Court determined how much process was due by weighing the inmate's interests against the state's, and by considering whether additional procedures would be beneficial. The Court noted that the inmate did not have a weighty interest in avoiding the confinement to administrative segregation because his freedom, as a prisoner, was already greatly restrained. *Id.* at 473. Moreover, the interest of the state in maintaining

[1] Although *Greenholtz*'s analysis of when a state-created liberty interest arises under the Due Process Clause was discredited by *Sandin v. Connor*, 515 U.S. 472 (1995), *Greenholtz* and other pre-*Sandin* cases like *Hewitt v. Helms*, 459 U.S. 460 (1983), contain informative, still-valid analysis of what process is due once a protected liberty interest has been established. *See Sandin*, 515 U.S. at 484 n.5.

security and insulating him from witnesses was strong. *Id.* Finally, the Court gave substantial consideration to the subjective nature of the officials' decision whether the inmate was a danger to prison security, and it ruled that a formalistic, trial-type process would not have been materially beneficial. *Id.* at 473-74. Thus, the Court simply required that the inmate receive "an informal, nonadversary evidentiary review," consisting of "some notice" of the charges against him and a chance to present his views, even if only in writing. *Id.* at 476.

The subjective, predictive decisions in *Greenholtz* and *Hewitt* are qualitatively different from retrospective determinations of historical fact, and they thus result in substantially different process due, even within the same deference-infused penological atmosphere. For instance, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court addressed the process due in prison-disciplinary cases that implicate the loss of sentence credits. In such cases, particular facts are at issue, and the Court thus required procedures that are tailored to ensuring an accurate *factual* determination, including: (1) advance written notice of the alleged violation; (2) a written statement of factual findings; (3) a right to present documentary evidence and to call witnesses unless doing so would unduly risk security; and (4) staff or inmate assistance for illiterate inmates and for complex cases in which the inmate would unlikely be able to collect and present the necessary evidence. *Id.* at 563-66. Likewise, the Court has mandated similar, though slightly more-complex procedures for retrospective factual determinations that concern weightier personal interests, as in the parole-revocation context addressed in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and



the probation-revocation context in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Such procedures, however, are "designed to elicit specific facts" and they "are not necessarily appropriate" to subjective, predictive security determinations. *Greenholtz*, 442 U.S. at 14.

### C. Because supermax-housing decisions turn on security-risk assessments that are subjective and predictive, due process is satisfied through informal, nonadversary proceedings.

As both a constitutional and practical matter, the type of process prescribed in *Greenholtz* and *Hewitt* is appropriate in the supermax-housing context. Again, the constitutional test is to weigh the competing individual and governmental interests in light of what procedures would be beneficial to the particular decision to be made. *See Mathews v. Eldridge*, 424 U.S. 319, 341-48 (1976). As discussed below, in both *Greenholtz* and *Hewitt*, the type of decisions at issue were nearly identical to the supermax context, and thus the same type of informal, nonadversary procedure should be appropriate, given that the balances of individual and governmental interests are similar.

#### 1. The nature of subjective supermax decisions is identical to the nature of decisions in the parole and administrative-segregation contexts.

Both parole-suitability and security-based segregation decisions (including supermax decisions) turn "largely on 'purely subjective evaluations and on predictions of future behavior.'" *Hewitt*, 459 U.S. at 474 (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

They must consider "what the entire record shows," including the gravity of the commitment offense and the inmate's whole prison experience. *See Greenholtz*, 442 U.S. at 15. Each is "essentially an experienced prediction based on a host of variables," *id.* at 16, although inmate-segregation decisions require additional subjectivity, because they must also consider "the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." *Hewitt*, 459 U.S. at 474. Indeed, "rumor, reputation, and even more imponderable factors, may suffice to spark potentially disastrous incidents," and officials must have the flexibility to respond to these variables. *Id.*

When a hearing is provided for a supermax-housing determination, it is assumed that its function is to discuss portions of the inmate's record that are relevant to the decision to be made, as in a parole-suitability hearing. In *Greenholtz*, for example, the board interviewed the inmate and considered any letters or statements that he wished to present in his support. *Greenholtz*, 442 U.S. at 4. It reviewed many factors during the hearing, among which were the commitment offense, the inmate's prior social and criminal history, his conduct and attitude during confinement, and both physical and mental examinations. *Id.* at 4 n.1. This is the same type of information that is relevant to the supermax-housing decision, and it is information with which the inmate is intimately familiar. Moreover, to the extent that institutional needs unrelated to the inmate's record will be considered, such matters should be well known by the officials, and the inmate's views ordinarily will be much-less probative.



Thus, it is not crucial for the notice to the inmate to include a list of factors on which the officials might rely. *See Greenholtz*, 442 U.S. at 14 n.6, *discussed in Burns v. United States*, 501 U.S. 129, 155-56 (1991) (Souter, J. dissenting). The inmate already will be able to address matters as they are raised at the hearing, and requiring the officials to cull through the inmate's record before the hearing in order to exhaustively list each possible matter of concern would provide little added benefit to the accuracy of the proceeding, but it would come at much expense to administrative resources. Moreover, as in a parole hearing, the inmate generally will be aware of the subject at issue—his record and any implication of excessive dangerousness that may be inferred from it. *See Hewitt*, 459 U.S. at 474. Sometimes, as in the case of Ohio here, regulations will contain a list of relevant objective factors so that the inmate will have a more-specific idea of the concerns that might be raised. *See Austin v. Wilkinson*, 372 F.3d 346, 351 (6th Cir. 2004). But even when no such list exists, the inmate will not be worse off than the inmates in *Greenholtz*. There, the parole statute listed fourteen specific factors that had to be considered, but they included one catchall that allowed consideration of "[a]ny other factors the board determines to be relevant." *Greenholtz*, 442 U.S. at 11 n.5, 16-18. The inmate could not be sure which of the various factors would be determinative nor whether the primary concern would fall under the catchall category. Yet the inmate's ability to respond to discussions about his own history made the absence of specific substantive notice inconsequential as a constitutional matter. *See Greenholtz*, 442 U.S. at 14 n.6.

It is also the inmate's participation in the hearing, in combination with the subjective nature of the decision, that

makes it unnecessary for officials to issue a decision that specifies "the particular 'evidence' in the inmate's file or at his interview" on which the decision rests. *See Greenholtz*, 442 U.S. at 15. The prisoner's very opportunity to be heard and to participate in the hearing "informs the inmate in what respects he falls short" if the decision is not in his favor. *See id.* at 16. To require a decision that summarizes the evidence would tend to equate the decision to a guilt determination, whereas it is more akin to a discretionary decision to grant or deny probation. *See id.* at 15-16.

A state may decide, however, that it is more in line with its management needs not to provide a hearing, but rather a review based on documents and written submissions from the inmate. As the Court explained in the parole context, "the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the [official] decisionmakers in predicting future behavior." *Greenholtz*, 442 U.S. at 13. Beyond this concern, the decisions at issue here "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *See Wolff v. McDonnell*, 418 U.S. 539, 561-62 (1974). Within this highly volatile context, some inmates' rehabilitation may be well served if they receive as much process as reasonably possible. *See id.* at 563. But others might exploit such opportunities to their own ends, and instead require swift and sure action from officials. *Id.* Thus, flexibility in the type of procedures used is warranted and should allow a review similar to that in *Hewitt*, which would provide more notice than the



time-of-hearing notice in *Greenholtz* in order to inform the inmate of the reason for the segregation determination. In *Hewitt*, for example, the inmate was given "some notice" of the primary or precipitating reason that he was considered for segregation, which was reasonable because (as the Court had to assume) he was not present when his record was being discussed by the officials. *Hewitt*, 459 U.S. at 464-65. A similar notice in the supermax context may list that the inmate is considered a danger because of a heinous commitment offense, particular gang associations, suspicion that he was involved in certain disruptive or violent behavior, consistent and repeated disciplinary violations, other similar security issues, or a combination of any such concerns. That type of notice will inform him of the general matters to be considered during the review without requiring that officials parse through inmates' often extensive files in order to compile an exhaustive list of the reasons to be considered and a summary of the evidence.

**2. The balance of the individual and governmental interests does not warrant a departure from the informal, nonadversary process that is appropriate for subjective, predictive determinations as previously addressed by the Court.**

The weights of the competing governmental and individual interests in this case are quite close to those in *Greenholtz* and *Hewitt*. As to the governmental interests, the goal in both the parole and inmate-segregation contexts (including supermax) is to protect the safety of others, by permitting the inmate to live in a less-secure environment only if it can be done without presenting an

excessive safety risk. *See Hewitt*, 459 U.S. at 474 (comparing administrative-segregation decisions to parole decisions). The segregation decisions, however, have an added governmental interest above the parole context—to safeguard the very volatile prison atmosphere from being disrupted. *See id.*

As to the personal interests, common sense dictates that the interest in parole—and thus freedom from custody altogether—is far stronger than the interest in being free just from supermax confinement. *See Hewitt v. Helms*, 459 U.S. at 468. And in those few states like Ohio where the supermax decision impacts a second interest, the inmate's eligibility for parole, that interest is the same as in *Greenholtz* where it was not deemed sufficient enough to warrant heightened procedures. Neither of these interests, therefore, weigh more heavily in the individual's favor than in *Greenholtz*.[3]

There are also strong similarities between the personal interests here and in *Hewitt*. What is clear is that in neither case does the Due Process Clause, of its own force, protect the individual's interest because it "is not one of great consequence." *Hewitt*, 459 U.S. at 473. "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montayne v. Haymes*, 427 U.S. 236, 242 (1976). And this Court held in *Hewitt*, 459 U.S. at 870, that it "is plain that the transfer

[3] There is some question whether parole eligibility should be considered in this case, however, given that Ohio law creates no liberty interest in parole. *Austin*, 372 F.3d at 361 (citing Ohio Rev. Code § 2967.03; *Wagner v. Gilligan*, 609 F.2d 866, 867 (6th Cir. 1979)).



of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." Thus, any process due can only be the result of a state-created liberty interest in remaining free from discretionary segregation, which is assumed under the question presented in this case, not an interest that is substantial enough to implicate the Due Process Clause of its own force. *See Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

To be sure, the confinement in *Hewitt* was for just seven weeks, and cumulative supermax confinement terms may be much longer, depending on a state's particular system. But if "some sort of periodic review of the confinement is provided," where officials consider "the facts relating to a particular prisoner" in conjunction with their "general knowledge of prison conditions and tensions," this should largely eliminate the importance of this distinction. *See Hewitt*, 459 U.S. at 477 n.9. Moreover, although *Hewitt* dealt with administrative segregation, rather than supermax confinement, the conditions at issue in *Hewitt* should not be discounted. The Court assumed that they were as restrictive as disciplinary segregation and imposed "severe hardships" such as: denial of access to vocational, educational, recreational, and rehabilitative programs; restrictions on exercise; and confinement to a cell for lengthy periods of time. *Id.* at 463 n.1, 467 n.4.

For these reasons, the similarities among *Greenholtz*, *Hewitt*, and supermax decisions are strong enough—especially in relation to the nature of the security decision to be made—that any slight differences in the individual interests do not warrant more-complex procedures.

### D. The more-adversary procedures required by the Sixth Circuit are ill matched to subjectively oriented supermax decisions and impose unnecessary burdens on prison administrators.

Despite the similarities among *Greenholtz*, *Hewitt*, and supermax decisions, the Sixth Circuit below mandated a set of more-complex procedures that track those announced in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *See Austin v. Wilkinson*, 372 F.3d 346, 358 (6th Cir. 204). This is so even though *Wolff* was a prison-disciplinary case, in which particular facts were at issue, not a subjective judgment—and in which the inmate's interest was in sentence credits that affected the length of his sentence, as opposed to mere segregated confinement. *See id.*

Although the requirements prescribed by the Sixth Circuit were modeled after *Wolff*, they are not identical. In fact, in some respects they are significantly more stringent in the context of a supermax-placement decision. Specifically, the Sixth Circuit required:

(1) "an exhaustive list of the reasons to be considered for placement and a summary of the evidence to be presented;"

(2) a right to present documentary evidence and to call witnesses unless doing so would unduly risk security;

(3) a record of the proceeding and if any reliance is made on confidential witnesses, a disclosure of as much information as possible;

(4) notice of the inmate's right to administratively appeal, along with a notice of any



newly considered confidential testimony within that review, an opportunity to present documentary evidence, and a "detailed and specific justification for the decision;" and

(5) semi-annual written and oral notification of the inmate's progress toward security-level reduction, listing specific conduct that is necessary to reduce levels and the amount of time reduction will take.

*Austin*, 372 F.3d at 358; 360 n.14; *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1028 (N.D. Ohio 2002).

These procedures are not necessary or even beneficial in the context of subjective, predictive supermax decisions because they—like the *Wolff* procedures they are modeled after—are designed to resolve factual disputes. *See Greenholtz*, 442 U.S. at 14. Indeed, the inclusion of factually oriented procedures in the supermax context would be counterproductive by distracting both the inmate and decisionmakers from the proper focus, which is an evaluation of the inmate's overall ability to interact peacefully. As the Court stated when it declined to apply *Wolff*-type procedures to the administrative-segregation context, "an administrator's judgment probably would be hindered" by "trial-type procedural safeguards." *Hewitt*, 459 U.S. at 474 & n.7. "Prison officials, wary of potential legal liability, might well spend their time mechanically complying with cumbersome, marginally helpful procedural requirements, rather than managing their institution wisely." *Id.* at 474 n.7.

Moreover, correctional agencies have a strong interest in avoiding being encumbered by such extensive, detailed procedures. The task of providing an inmate with an exhaustive list of reasons to be considered and a summary of the evidence to be presented is excessively burdensome,

and it serves no essential function that is not already met by the informal, nonadversary procedures in *Greenholtz* and *Hewitt*. The inmate already will be advised, either in the hearing or in a notice, of the general reasons that he came up for review. This will enable him to discuss his prison history in light of the primary factors to be considered and to present any special considerations regarding the threat he poses. If he is ultimately placed into supermax housing, the hearing or the notice will have sufficiently advised him of the concerns at issue, and thus the decision need not include a detailed and specific justification. Indeed, no such detailed decision was required even in the parole context, where the individual interests are at least as significant. *Greenholtz*, 442 U.S. at 15-16.

The requirement that witnesses be allowed is also misplaced in this context. In prison, the transportation of witnesses, and even making them available by telephone, demands scarce prison resources, while the traditional and most-valuable benefit of a witness—to provide testimony about disputed facts—would be nonexistent. And last, although periodic review is appropriate, listing the specific factors for reduction of custody classification is analogous to the detailed decision that *Greenholtz* rejected. Plus, such notice may not be as desirable as the Sixth Circuit expected. It could give the inmate an unrealistic expectation of release into the general population despite the fact that conditions there may change, or other issues may arise, making it necessary to keep the inmate in supermax housing.

Aside from considerations of how useful the *Wolff*-type procedures are in the supermax context, it should not be ignored that in *Wolff*, the weight of the personal interests were significantly higher, which contributed to the determination of how much process was due. *Wolff*, 418 U.S. at



561 (calling the interest one of "considerable importance"). In *Wolff*, sentence credits were implicated, and thus so too was the length of the sentence. *Id.* That interest is certainly greater than the interest in avoiding supermax confinement, which entails a mere change in the level of custody restriction, rather than an elimination of confinement altogether. *See Hewitt*, 459 U.S. at 468. Further, even when parole eligibility is affected by supermax classification, an interest in parole eligibility is not as significant as an interest in sentence credits. Sentence credits create an absolute expectation of release by an earlier date, whereas parole eligibility only qualifies the inmate for a parole-suitabilty hearing, at which he may or may not be granted release. That decision typically is quite discretionary. *See Greenholtz*, 442 U.S. at 13.

For these reasons, due process should be satisfied in the supermax context if an inmate receives an informal, nonadversary determination of his dangerousness. Such review provides adequate opportunity for inmates to participate in the decision making process. Moreover, it recognizes the limited constitutional interest that inmates have in avoiding supermax confinement and the strong governmental interests in efficiently separating dangerous inmates from the general population of prisons.

## CONCLUSION

For the above-stated reasons, the *amici* states urge this Honorable Court to reverse the decision below.

Respectfully submitted,

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**In the**
**Supreme Court of the United States**

REGINALD WILKINSON, at al.,
*Petitioners,*

v.

CHARLES E. AUSTIN, et al.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

# BRIEF OF CORRECTIONS PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## TABLE OF CONTENTS

Table of Authorities ..... i

Interest of *Amici Curiae* ..... 1

Summary of Argument ..... 6

ARGUMENT

I. THE DECISION TO PLACE A PRISONER IN CLOSE CUSTODY OR SUPERMAX IS ENORMOUSLY IMPORTANT TO THE PRISONER, TO STAFF AND ADMINISTRATION, AND TO OTHER PRISONERS ..... 8

II. THE CHARACTERIZATION OF THE PLACEMENT DECISION AS "MULTIVARIATE" AND "PREDICTIVE" OBSCURES ITS ESSENTIAL QUALITIES ..... 11

III. THE CORRECTIONAL ENVIRONMENT CREATES PRESSURES INFLUENCING SUPERMAX PLACEMENT DECISIONS THAT REINFORCE THE NEED FOR PROCEDURAL REINFORCEMENT OF CAREFUL FACT-FINDING ..... 13

A. Necessary Elements of the Placement Process ..... 16

B. The Release Decision ..... 18

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**Cases:**

*Freeman v. Berge*, 68 Fed.Appx. 738, 2003 WL 21462603 (7th Cir. 2003) ..... 3

*Jones'El v. Berge*, 164 F.Supp.2d 1096 (W.D.Wis. 2001) . 3

*Madrid v. Gomez*, 889 F.Supp. 1146 (N.D.Cal. 1995) .... 8

*Wolff v. McDonnell*, 418 U.S. 539 (1974) ..... 18

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Walter J. Dickey, Frank J. Remington, *et al., Criminal Justice Administration* (3d ed. 1990) ..... 2

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## INTEREST OF AMICI CURIAE[1]

The amici herein are corrections professionals, all of whom have substantial experience in prison administration, including managing high-security prisoners, and most of whom have served as prison wardens or as chief administrators of prison or jail systems. Their expertise may assist the Court in assessing the issues before it from the practical standpoint of prison management.

Walter J. Dickey, the primary author of this brief, served as Administrator (now "Secretary") of the Wisconsin Department of Corrections from 1983 to 1987. His appointment followed his drafting, after extensive consultation with prison staff and managers, the Administrative Code for Correction, which regulates all aspects of the Wisconsin correctional system as well as the parole and probation systems, including a detailed disciplinary code and procedure, criteria for program and security placement and institutional transfers, and all other operational aspects of prison life and administration from the grievance system to the use of force to prison visits.

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

During these consultations and as Administrator, he attended hundreds of hearings concerning prisoners' classification and discipline. Subsequently, he served as Chair of the Task Force on Sentencing and Corrections appointed by Governor Tommy G. Thompson in 1996 and as Chair of the Committee on Intensive Sanctions appointed by the Speaker of the Assembly Wally Kunicki in 1991. In 2000, he served on the Wisconsin Legislature's Criminal Penalties Study Committee which was charged with planning the implementation of "truth in sentencing" in Wisconsin. He has, since leaving Corrections, informally advised all of his successors. He has written extensively on sentencing and corrections.[2] He is presently serving as Monitor, by appointment of Judge Barbara Crabb of the Western District of Wisconsin, in litigation concerning conditions at Wisconsin's "supermax" prison at Boscobel, Wisconsin (recently renamed the "Wisconsin Secure Program

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[2] *See, e.g.*, *Punishing Inequalities: Race and Criminal Justice in Wisconsin* (with Joel Rogers and Michael Smith), Wisconsin Academy Review (2001); *What If Corrections Were Serious about Public Safety* (with Michael Smith), 2 Corrections Management Quarterly (1998); *Corrections: Budget and Policy Issues for the 1990s*, in *Dollars and Sense* (LaFollette Institute for Public Affairs, 1994); *A Future for Research on Prisons*, 16 Law and Social Inquiry 101 (1991); *Criminal Justice Administration* (with Frank J. Remington et al.) (3d ed. 1990); *The Promise and Problems of Administrative Rulemaking in Corrections: The Wisconsin Experience*, 1983 Wis.L. Rev. 285 (1983).



Facility"), in which he helped mediate settlement.[3] He is a member of the faculty of the University of Wisconsin–Madison Law School, to which he was appointed in 1976.

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[3] *See Freeman v. Berge*, 68 Fed.Appx. 738, 2003 WL 21462603 (7th Cir. 2003) (affirming approval of settlement); *Jones'El v. Berge*, 164 F.Supp.2d 1096 (W.D.Wis. 2001) (granting preliminary injunction with respect to inmates with mental illness).

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## SUMMARY OF ARGUMENT

The decision to confine a prisoner in highly restrictive supermax confinement is enormously important to the prisoner, to prison staff and administration, and to other prisoners. Such confinement has a devastating impact on prisoners' already limited quality of life and will usually also extend the length of the prisoner's incarceration. On the other hand, supermax facilities are intended to confine the most disruptive and dangerous prisoners to protect the safety and security of prison staff and other prisoners. Prisoners and correctional administrators thus have a common interest in accurate and reliable fact-finding and decision-making in supermax placement and retention decisions.

Characterizing supermax confinement decisions as "predictive" and "multivariate," as the Respondent has done, obscure the fact that such decisions are ultimately based on facts and on inferences from facts. For these decisions, like others in the prison setting, careful fact-finding procedures remain necessary for accurate and reliable decision-making.

There are pressures in the correctional environment that can result in "overclassifying" inmates to supermax facilities. The temptation to "dump" troublesome prisoners may result in inappropriate supermax placement of those who are merely prone to complaint or litigious or whose reputations as disruptive or gang-affiliated prisoners are inflated. It may also result in the placement of mentally ill prisoners in the highly restrictive supermax environment, where their condition is likely to worsen and they may commit additional misconduct justifying their retention in the supermax. There may also be



pressure to place inmates in a supermax facility simply because cells are available there while other facilities remain crowded.

To control these pressures and avoid inappropriate and unnecessary supermax confinement, it is essential that the prison system have clear standards and criteria for placement and retention, strong fact-finding procedures carried out by a disinterested body within the prison system, and review of those decisions by higher authorities in the prison system.

The supermax placement process should therefore include clear criteria for decision. The prisoner should receive adequate advance notice of all the reasons for the proposed placement, and disclosure of the evidence subject to necessities of security and safety, so the prisoner can respond meaningfully to them at the placement hearing. While cross-examination is not helpful in this setting, the hearing body should be prepared to inquire into the sources and reliability of the information presented. Prisoners should be able to call witnesses where there are factual issues that witnesses may helpfully address, subject to correctional necessity. The hearing body should find facts specifically (by a standard no lower than "more likely than not") and analytically relate them to the criteria for placement in its findings, both to facilitate higher-level review of the decision and to ensure that the hearing body has carefully weighed the facts as they relate to the placement criteria.

The decision to release from supermax facilities should be done as carefully and reliably as the placement decision and with equivalent procedural protection. The object of the decision should be to end supermax confinement as quickly as possible consistent with safety and security, and avoid imposing

such harsh conditions of confinement for any longer period than necessary.

## I. THE DECISION TO PLACE A PRISONER IN CLOSE CUSTODY OR SUPERMAX IS ENORMOUSLY IMPORTANT TO THE PRISONER, TO STAFF AND ADMINISTRATION, AND TO OTHER PRISONERS.[4]

Maintaining order in prison is essential to the welfare of everyone there: administrators, staff, and especially prisoners.

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[4] The term "supermax" does not have a precise meaning. It is generally used to refer to maximum security or close custody segregation units which are designed and/or operated to provide some combination of greater isolation among prisoners, less contact with staff, less out-of-cell time, and less access to or even sight of the outdoors than in the traditional prison segregation unit. Traditional segregation is often merely a standard cellblock in which prisoners are kept locked in their cells most of the day but remain able to communicate with each other, interact with staff, go to an exercise yard, etc. Some maximum security units display some or all of the characteristics of a supermax unit without being so labelled. *See, e.g.*, *Madrid v. Gomez*, 889 F.Supp. 1146, 1228-29 (N.D.Cal. 1995) (describing Pelican Bay "Security Housing Unit," designed to minimize staff-inmate contact, with cement exercise pens permitting no view of the outdoors). There is no question that the restrictive characteristics of the OSP facility, as described by the district courts, merit the supermax label.



Most prisoners want and need order because a daily life characterized by disorder, chaos, and personal insecurity is dangerous and debilitating.

There are three principal ways in which prison order is achieved. The first is the prisoners' acceptance of the rules of prison life, which is obtained by having legitimate rules that are necessary and fairly enforced. Unnecessary rules and unfair enforcement do not promote order in prison, they threaten it by undermining the rules' legitimacy and with it the prisoners' acceptance of them. The second is through incentives: the ability to get out of cells, go to work, school, meals, exercise, visits and special events – routine activities, but vital to the quality of prisoners' lives. The last resort is through physical and structural restraint: handcuffs, leg irons, bars and locks. Though these are surely the most publicly visible tools of maintaining order, it is the informal forces – the desire for order, personal safety, and social contact (including work, school, and personal development) – which most profoundly shape order maintenance in prison.

Supermax prisons are an extreme example of reliance on the third method of control, one that prison administrators in some systems rely on when lesser means of keeping order have failed.

The decision to place an inmate in extremely restrictive custody in a Supermax prison is of enormous importance. The safety of staff and prisoners requires that those who have demonstrated their dangerousness be reliably identified, separated and closely controlled. For the prisoner so confined, such confinement profoundly affects the quality of life in prison

as well as the opportunities for release from prison, so it is crucial to avoid erroneous Supermax placement. Moreover, the existence of a Supermax facility presumably is intended to help deter the kinds of dangerous and disruptive behavior that result in placement there, but it will not deter effectively if prisoners are placed there arbitrarily, without relation to the actual gravity of their behavior. Thus there is a convergence of interest of prisoners and correctional administrators in accurate and reliable fact-finding and decision-making and in the legitimacy of the decision-making process.

The decision to place a prisoner in Supermax confinement is actually more significant than prison discipline, because it affects the quality of life of individual prisoners more than virtually every disciplinary sanction. (Most disciplinary sanctions in a prison do not involve segregation, but some lesser and more temporary loss of liberty and privileges, such as cell confinement, loss of recreation and extra work duty.) Placement in a supermax is far more restrictive than the most serious disciplinary measure – segregation – if only because it is ordinarily of longer duration. But it also vitally affects the duration of overall confinement in prison for the individual, and limits the possibility that the prisoner can demonstrate the ability to live at lower security levels. The latter is usually a precondition for release in systems which have discretionary release, by informal practice if not by formal policy. Placement in such high-security confinement also typically limits the prisoner's ability to earn "good time" or other release credits. Thus supermax placement effectively extends the duration of incarceration in most prison systems today. Moreover, supermax is a setting which limits the prisoner's opportunity to earn money, to have contact visits, and to engage in



educational, vocational, or rehabilitation programs (lack of which may further extend incarceration). It is also a setting in which prisoners are more likely to be disciplined (often resulting in further loss of good time), because of the effect of conditions on prisoners and staff. After all, extended confinement under conditions of sensory deprivation creates enormous psychological pressure on prisoners. And staff treat prisoners who in every encounter are handcuffed and in chains, or behind locked doors, much differently than when these restraints are not present.

## II. THE CHARACTERIZATION OF THE PLACEMENT DECISION AS "MULTIVARIATE" AND "PREDICTIVE" OBSCURES ITS ESSENTIAL QUALITIES.

Which prisoners require close custody or segregation is a question of judgment, and judgments differ. But, like all matters of judgment, these decisions ought to be reached through fact-finding and inferences from the facts. So, the circumstances under which it is exercised ought to encourage thoughtful inquiry into and finding of the facts, their possible significance, and the relationship of those facts and inferences to the system's criteria for placements in Supermax.

It is vital that the fact-finding for placement in Supermax be accurate and reliable, because it affects the safety of prisoners and staff; because it profoundly affects the individual so confined; and because to do less undermines the legitimacy of the order maintenance regime in a prison. If these judgments are not fair in fact, or not perceived to be fair by those affected, they undermine the rule of law we want

prisoners to adhere to - in prison, and when they return to live amongst us. Perhaps the most powerful influence on prisoner behavior is that which they see modeled by prison staff. No one has an interest in anything other than reliable fact-finding in support of this vital decision. No one has an interest in undermining its legitimacy.

The characterization of the decision as "predictive" and "multivariate" disguises its most vital qualities. The decision as to placement depends on facts and on inferences drawn from those facts. The facts that are relevant to the decision about future behavior are of a variety of kinds. Some are historical, usually behavioral. (What did the person actually do?) Others are contextual. (The inmate was found guilty in a disciplinary process of assault. Was the assault part of a fight or unprovoked? What gave rise to the incident?) Because historical and contextual facts are used to make a judgment about the future, even the most simple example shows how important the facts and the context are. For these reasons, any suggestion that the "multivariate" and "predictive" aspects of the decision lessen the need for careful fact-finding procedures is badly mistaken.

Predictions about future behavior require attention not only to past behavior and inferences about proclivity, but also to the possible circumstances in which the inmate might be placed. If the need is for control, what are the situations available which might afford the necessary level of control? This is a comparative decision and requires reference to the possible placements and the plausibility they will afford the necessary control, as well as an analysis of the other implications of the decision, for the prisoner and for others.



Clarity, specificity, and judgments made to a specified level of certainty are surely possible in this area of life, as they are in so many others.

## III. THE CORRECTIONAL ENVIRONMENT CREATES PRESSURES INFLUENCING SUPERMAX PLACEMENT DECISIONS THAT REINFORCE THE NEED FOR PROCEDURAL REINFORCEMENT OF CAREFUL FACT-FINDING.

In all correctional systems, there is pressure on institutional staff to "dump" inmates who are perceived as nuisances or who present management difficulties. For example, a prisoner who is a frequent user of the grievance system or is litigious, or connects to the press, is a nuisance to some prison administrations. A prisoner who has prevailed in the grievance system in litigation can become a symbol to other prisoners and to staff and invite retaliation. Prisoners who have special needs which make demands upon the institution, such as for special diet, medication and accommodations, are also burdensome.

It is human nature for prison staff to want to retain in their custody the inmates who are most easy to manage and to rid themselves of those who are most difficult to manage, annoying, or demanding or a nuisance. It is tempting and easy to lump those who need close custody because of their dangerousness with those the institution simply wants rid of without even being aware of it. And, of course, prisoners get reputations – sometimes deserved, sometimes not – which can combine with overblown rhetoric and meaningless

generalizations to short circuit meaningful fact finding and lead staff to jump to conclusions rather than reason to them. For example, "gang leadership" and "gang affiliation" are terms with little helpful meaning without greater definition and specificity. To be sure, there are prisoners who lead and engage in concerted activity which can undermine prison management, order, and the safety of staff and prisoners. However, some officials may be tempted to "overdiagnose" the fact and degree of involvement in such dangerous conduct, as well as a risk of crediting false or distorted information from unreliable informants who may have private agendas unrelated to prison order.

The antidote is clear: specific, reliable fact finding and the application of those facts to a clear legal standard by a disinterested body within the prison administration in a reasoning process, and review of that decision by higher authority in the correctional system.

Among those dumped, inevitably, are the mentally ill. While some supermax prisons have criteria for excluding the mentally ill, in practice there are many prisoners who do not fit standardized diagnostic criteria but are clearly mentally ill in ways that affect their behavior; there are also prisoners whose mental illnesses simply are not adequately diagnosed. These are the marginal, and prisons are full of such people. Their mental condition can lead them to behave in ways that lead to the conclusion their problems are primarily behavioral, when they are in fact mental, and best addressed in a different setting. Placement of such individuals in a supermax setting is particularly important to avoid, since the combination of highly restrictive conditions and rules, conditions of sensory



deprivation, and their mental health condition, compounded by the difficulty of obtaining mental health care in the supermax setting tends to result in further misbehavior, resulting in further disciplinary action and prolonged retention in supermax, and often in worsening of the underlying mental health condition.[5]

Finally, in every prison system in America, there is pressure to fill all cells because every prison system is overcrowded. There is undoubtedly pressure in Ohio, as there is in Wisconsin, to keep the Supermax cells filled. It is difficult to justify empty cells when other prisons are overcrowded, and especially hard to justify the high cost of Supermax when the cells are not full. (In Wisconsin, the cost to operate Supermax is more than double that of our maximum security institutions.) There is often a temptation, when under pressure to fill cells, to overclassify if the empty cells are at higher custody levels.

Requiring strong fact-finding procedures positions those charged with the placement decisions to resist pressure for dumping and for overclassifying to fill cells – both explicit external pressures and the unconscious bias to which those working in the correctional environment may become prey. It allows decision makers to point to legal standards that govern their decisions and the need for sufficient facts to satisfy the standard, in the face of informal and cultural pressure to place or keep inmates in Supermax. It also helps the decision makers maintain their focus on the relevant placement criteria and on

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[5] This last conclusion is supported both by prison administrators' experience and by substantial mental health literature. *Amici* understand there will be a separate *amicus* brief addressing the latter.

the relevant facts and other concerns at issue for each individual prisoner.

**A. Necessary Elements of the Placement Process**

To ensure the reliability and integrity of the decision to place a prisoner in a supermax prison, the following are necessary and can be provided without undue burden on prison staff.

1. There should be a clear legal standard – criteria – upon which the decision is based. The criteria to be relied upon in an individual case should be specified. It appears that Ohio has promulgated such criteria and they are not in controversy.

2. The prisoner should know in advance what is at issue in the hearing. If the prisoner does not, the fact-finding process is impaired because the prisoner cannot address the relevant issues, and the legitimacy of the process is destroyed because the prisoner will feel (correctly) that he did not have a fair opportunity to respond to the allegations against him. Ordinarily, the prisoner should have advance access to all the evidence to be relied upon and an opportunity to rebut, explain, and add to the facts, subject to the need in some cases to withhold information for safety or security reasons (to protect the identity of an informant, for example). It appears that the Ohio practice is in some cases to base decisions on considerations that are not made known to the prisoner, or are disclosed only after a decision is made. Such a practice fundamentally undermines both the fairness and



the utility of the hearing procedure and should be avoided except in instances of absolute necessity.

3. The hearing process of necessity will combine the inquisitorial with the adversarial. If facts must be withheld from the prisoner the hearing body must inquire about the facts withheld to ensure their reliability. Inquiry should be made about the circumstances under which the information developed and any incentives, explicit or implicit, for providing the information. After all, prisons are full of informants of varying reliability.

4. Prisoners should be able to call witnesses when there are facts at issue that witnesses may shed light on. While allowing witnesses can present risks, existing law and prison officials' experience with witnesses in disciplinary hearings allows them to limit the right when necessary (e.g., to protect the identity of confidential informants) and to exclude witnesses who do not have relevant information.

5. Experience shows that cross-examination by prisoners or their advocates is awkward, time-consuming and problematic in a prison setting. For this reason, the hearing body must be independent, but must be willing, indeed required, to make its own inquiry of witnesses and information when further inquiry is indicated. It is often unrealistic to expect a prisoner's advocate – which

should be available as part of this process[6] – to press staff witnesses in ways that will ensure reliable fact finding.

6. In its decision, the hearing body should specifically find the facts upon which it relies and analytically relate those facts to the criteria for placement and retention. The purpose of doing so is not just to make a record, but to ensure the soundness of the decision. A hearing body that is required to explain its decisions carefully is more likely to make them carefully and catch its mistakes before they become final. Some subjective level of certainty about the facts and inferences should be required. Given the serious consequences of making a mistake, it should not be sufficient that the facts and inferences be merely plausible. They should probably be at least more likely than not.

7. The fact finding and analytic reasoning process need to be specific enough to allow meaningful review of the decision at higher levels of the prison system.

**B. The Release Decision**

An important goal of correctional administrators should be to get prisoners out of supermax as quickly as is safely

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[6] We refer here to assistance by an employee, as discussed in *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974), in connection with disciplinary hearings.



possible.[7] There is no interest in keeping a prisoner in such conditions unnecessarily. Doing so after the necessity has passed is an unjustified infliction of suffering and also does damage to penological interests, since prisoners treated in such fashion are likely to become embittered and more difficult to manage, and in many cases their mental health may be at risk. For these reasons, a primary goal of supermax confinement should be ending it as quickly as is safe. On the other hand, releasing a prisoner who continues to present such risks that supermax confinement remains justified presents an obvious danger to safety and security.

For these reasons, the decision and process for review of supermax confinement must be just as careful and reliable as the process for placing them in it initially, and should be similar to that initial placement. The need for clear standards, notice to the prisoner of what will be at issue at the hearing,[8] inquiry into

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[7] In addition to the procedural means at issue in this case, prison systems that use supermax facilities and other close confinement must pay attention to creating means and opportunities for prisoners to get out of that status by demonstrating willingness and ability to abide by prison rules when in the company of others.

[8] The issues at a review hearing will not be identical to those at the initial hearing, since the prisoner's conduct since the last hearing will always be relevant to the decision to retain or to release – especially in a system like Ohio's which allows as much as a year to elapse between hearings. This unusually long interval between review hearings, which is undesirable in itself because it increases the risk of unnecessarily prolonging

factual issues, and specificity in fact-finding and relating those facts to the standard for retention in supermax confinement are equally important at the review stage.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals for the Sixth Circuit.

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supermax confinement, enhances the importance of careful fact-finding at each review hearing.

No. 04-495

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IN THE
# Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL.,

*Petitioners,*

v.

CHARLES E. AUSTIN, ET AL.,

*Respondents*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* HUMAN RIGHTS WATCH, AMERICAN FRIENDS SERVICE COMMITTEE, BLUHM LEGAL CLINIC, THE CENTER FOR JUSTICE IN CAPITAL CASES, ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

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# TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 6

I. The Use Of Supermaximum Security Confinement For Prolonged, Indefinite Periods Through Administrative Assignment Exposes Prisoners To Harsh, Atypical Dehumanizing Conditions. ..... 7

A. The Use Of "Supermax" Facilities Has Dramatically Expanded Over The Last Two Decades. ..... 7

B. The Typical Conditions Of "Supermax" Confinement Are Severe And Prolonged. ..... 9

II. Prolonged "Supermax" Confinement Produces Significant Adverse Psychological Consequences For Prisoners. ..... 12

III. Under These Circumstances, The Constitutional Principles Of Due Process Require At A Minimum The Procedural Protections That The Courts Below Properly Found Lacking In The Ohio State Penitentiary. ..... 16

IV. Procedural Safeguards Are Required To Protect The Internationally Recognized Human Rights Of Prisoners. ..... 19

A. Principles Of International Law Properly Inform And Illuminate American Constitutional Jurisprudence. ..... 19

B. "Supermax" Facilities Raise Serious Human Rights Concerns. ..... 21

C. Human Rights Experts Agree That Extensive Procedural Protections Are Essential And Must Accompany Assignment To "Supermax" Facilities. ..... 22

1. The United Nations Committee Against Torture And The European Committee For The Prevention Of Torture And Inhuman Or Degrading Treatment Or Punishment ..... 22

2. International Human Rights Organizations ..... 25

CONCLUSION ..... 29



TABLE OF AUTHORITIES

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William Collins, U.S. Dep't of Justice, *Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit* (2004)..... *passim*

## INTEREST OF *AMICI CURIAE*[1]

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide, with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. In the United States, Human Rights Watch has addressed a range of human rights issues, including U.S. prison conditions. Human Rights Watch has filed amicus briefs before various bodies, including U.S. courts and international tribunals. The proliferation of supermaximum security facilities in which prisoners endure harsh conditions for prolonged periods of time has been a particular concern of Human Rights Watch and the subject of several Human Rights Watch reports. Because the Court's decision in this case will affect the due process rights not only of prisoners in the Ohio State Penitentiary ("OSP"), but also any prisoner that is "administratively" assigned to a supermaximum or "supermax" facility, Human Rights Watch has a substantial interest in the question presented.

The American Friends Service Committee ("AFSC") is a non-profit organization which carries out service, development, social justice, and peace programs throughout

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make any monetary contribution to the preparation or submission of this brief.

the world. Founded by Quakers in 1917, AFSC's work is based on the Quaker belief in the worth of every person and faith in the power of love to overcome violence and injustice. Quakers have long played a role in human rights and criminal justice, having been heavily represented among the founders of what AFSC now regards as a failed experiment in institutionalization called the penitentiary. These institutions were initially comprised of isolation units which are the predecessors of today's "supermax" prisons. AFSC founded and still operates its *PrisonWatch* program to monitor the inhumane conditions in isolation units nationally, has published a variety of reports and histories regarding control or isolation units, and its staff members have testified widely on the issue. In 1985, AFSC published "The Lessons of Marion," which sounded the alarm about the impending future of contemporary control units. In 1997, AFSC published a "Survivor's Manual," written by prisoners living in extended isolation for other prisoners who faced the same situation. AFSC has identified abolition of isolation unit confinement as one of two national criminal justice reform priorities to be addressed in the coming years.

Founded in 1969, the faculty and students of the Bluhm Legal Clinic at Northwestern University School of Law represent clients in a variety of juvenile and criminal proceedings, including criminal appeals and post-conviction proceedings involving clients who are incarcerated in Illinois prisons. The Bluhm Legal Clinic's work on behalf of prisoners awaiting execution and prisoners who have been wrongfully convicted has led its faculty and students to become increasingly concerned about the conditions of confinement in prisons in Illinois and around the country, particularly in "supermax" facilities such as Illinois' Tamms Correctional Center, a "supermax" prison in southern Illinois. The decision rendered by the Supreme Court in this case will necessarily affect conditions of confinement for many of the Bluhm Legal Clinic's clients for years to come.



The Center for Justice In Capital Cases at the DePaul University College of Law was created to train all of the capital defense team -- lawyers, defense investigators and Mitigation specialists, as well as law students who have the opportunity to work on capital cases in the Death Penalty Legal Clinic. Its mission is to create a higher standard of practice in the capital arena through vigorous advocacy and investigation, cutting-edge work in the social sciences, and a client-centered philosophy.

The Illinois Association of Criminal Defense Lawyers is the only statewide criminal defense lawyer's organization in Illinois. It represents both the public and private sectors of the criminal defense bar. It is a not-for-profit organization that retains complete independence from outside funding sources by being supported solely by its members. Its goal is to achieve justice and dignity throughout the criminal justice system by fostering, maintaining, and encouraging the integrity, independence, and expertise of lawyers in the field of criminal defense. Its purpose is to inform members by providing resources via committees, continuing education seminars, and current legislative decisions, as well as to advocate on behalf of the criminal justice system by presenting views and cases before state and federal legislative bodies, and by assisting in the writing of *amici curiae* briefs.

The National Lawyers Guild ("NLG") is a national association of legal professionals, law students and jailhouse lawyers with offices in New York City. The NLG was founded in 1937 as the first inter-racial bar association in the United States. Throughout its history, NLG members have represented literally thousands of prisoners and have advocated on behalf of the Due Process, First Amendment and other rights of incarcerated people. The NLG national executive committee includes two vice-presidents who are jailhouse lawyers and has a number of members who are

jailhouse lawyers. NLG members represented the interests of prisoners injured or killed in Attica, New York in over thirty years of litigation. The issues raised by the instant appeal concerning the due process rights of prisoners who are "administratively" assigned to a supermaximum facility are of vital concern to NLG members and their clients.

## SUMMARY OF ARGUMENT

The conditions inmates endure in supermaximum security confinement in the United States are the most harrowing and dehumanizing that courts have found permissible under the Constitution. [2] Prolonged round-the-clock confinement in small, sometimes windowless cells with little or no opportunity for social interaction, mental stimulation or recreational activities, pushes "the outer bounds of what most humans can psychologically tolerate . . . ." *Madrid v. Gomez*, 889 F.Supp. 1146, 1267 (N.D. Cal. 1995), *mandamus denied*, 103 F.3d 828 (9th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997). Courts throughout the country have recognized what numerous studies of and clinical visits to "supermax" facilities have documented: The debasing conditions in which prisoners live result in myriad psychological effects, including anxiety, chronic depression, emotional breakdowns, suicidal thoughts and behavior, paranoia, uncontrollable anger, hallucinations, and hypertension. For those who are mentally ill, being subjected to such conditions has even more perilous consequences, with many inmates suffering dramatic psychological deterioration necessitating hospitalization.

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[2] The Amici submitting this brief do not believe that the conditions of "supermax" confinement, discussed below, should be properly found to pass muster under the Eight Amendment. However, that issue is not before the Court in the instant case.



No inmate should be subjected to such conditions for months, much less years, without an extremely careful, objective and informed determination that such confinement is necessary because of the specific security and safety risks posed by the individual. Indeed, beyond our borders, international human rights principles reinforce that conclusion. International human rights standards as applied are recognized to limit severely the use of such facilities. To the extent supermaximum conditions are to be permitted at all, their use must be carefully circumscribed to circumstances and for durations that are thoroughly justified.

Yet, the record of the process of assignment to supermaximum security confinement demonstrates something quite different. Research and litigation have documented that the use of these facilities are not limited to "the worst of the worst," but that correctional systems all too frequently place inmates in "supermax" facilities arbitrarily, carelessly, and unnecessarily.

Although incarceration necessitates a surrender of many rights and privileges, "prisoners do not shed all constitutional rights at the prison gate . . . ." *Sandin v. Connor*, 515 U.S. 472, 485 (1995). This principle applies in full force to the consideration of rights under the Due Process Clause applicable to the assignment to and continued retention in so-called "supermax" confinement. The procedural protections of due process recognized by the courts below in this case are the minimum constitutional safeguards essential to ensure that these dangerous, dehumanizing facilities be used only where and when the facts are consistent with the justifications for their use. The deprivations are too severe and the adverse psychological toll too great to require anything less than robust procedural protections to ensure that the decisionmakers get it right.

## ARGUMENT

This Court has long recognized that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Due process is a flexible concept "and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).[3] A state-created liberty interest, protected by the Due Process Clause, arises in the prison context when the circumstance at issue "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

At minimum, the facilities at issue here impose such hardships and deprivations. As discussed below, the extreme conditions and the dangers posed to the inmates subjected to them demand the highest level of procedural protection

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[3] In *Mathews*, this Court articulated the now-familiar tripartite test for procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.



possible to ensure that the use of these facilities is properly limited to those whom require this form of confinement under the justifications for its use. *See Mathews*, 424 U.S. at 341 ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process").

### I. The Use Of Supermaximum Security Confinement For Prolonged, Indefinite Periods Through Administrative Assignment Exposes Prisoners To Harsh, Atypical Dehumanizing Conditions.

#### A. The Use Of "Supermax" Facilities Has Dramatically Expanded Over The Last Two Decades.

Prison systems in the United States have long had "prisons within prisons" -- harsh solitary confinement cells to which prisoners are sent for breaking the rules. Over the last two decades, however, U.S. correctional systems have developed a new generation of super-maximum security units and facilities in which prisoners deemed dangerous or disruptive can be housed indefinitely.[4] More than 20,000 prisoners are now confined under "supermax" conditions, as

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[4] "Supermax" facilities are also known, *inter alia*, as special housing units or security housing units (SHUs) and extended control units (ECUs). The National Institute of Corrections defines "supermax" housing as "a free standing facility or distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated." U.S. Dep't of Justice, *Supermax Housing: A Survey of Current Practice* at 1 (1997), *available at* http://www.nicic.org/pubs/1997/013722.pdf.

corrections officials have considered them a useful management tool for maintaining control over and responding to tension and violence in their facilities. *See* Human Rights Watch, *Out of Sight: Briefing Paper on Supermax Prisons* (2000), *available at* http://www.hrw.org/reports/2000/supermax/.[5] Although in 1984 there existed only one prison in the United States that would today be classified as a "supermax" prison, today 36 states and the federal government currently operate a total of at least 57 supermaximum security units, built either as annexes within existing prisons or as free-standing facilities. *See* Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana* (1997), *available at* http://www.hrw.org/reports/1997/usind/.[6]

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[5] *Out of Sight* draws on extensive research by Human Rights Watch on the conditions and operations of supermaximum security facilities in the United States. Human Rights Watch has inspected eight state and federal "supermax" facilities and reviewed extensive documentation on numerous others.

[6] In almost every state in the United States, exploding prison populations and overstretched budgets have overwhelmed the ability of corrections professionals to operate safe, secure and humane facilities with adequate numbers of properly trained staff and sufficient programs and productive activities for the men and women in their custody. Corrections officials have turned to supermaximum security units to remove dangerous or disruptive prisoners from the general populations as an alternative method to protect both staff and inmates and, it is hoped, deter other prisoners from committing acts that might result in their transfer to such harsh facilities. *See Cold Storage*, *supra*; Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 Crime & Just. 385, 391 (2001).



### B. The Typical Conditions Of "Supermax" Confinement Are Severe And Prolonged.

Although conditions and policies vary somewhat from facility to facility, the common characteristics of "supermax" confinement include extreme social isolation; reduced environmental stimulus; scant recreational, vocational, or educational opportunities; and extraordinary levels of surveillance and control. They are undeniably harsh and atypical.

Prisoners spend all their waking and sleeping hours locked alone in small, sometimes windowless cells. The cells, measuring 60- to 80-square feet, typically contain a concrete slab with a thin mattress for a bed, a concrete shelf to serve as a desk, and a toilet and sink combination. The cell door is made of perforated or solid steel with a small fixed window and a slot at the bottom. Prisoners are fed in their cells, their food passed to them on trays through the slot in the door. *See* Human Rights Watch, *Ill Equipped: U.S. Prisoners and Offenders With Mental Illness* at 146 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/; Craig Haney, *"Infamous Punishment": The Psychological Consequences of Isolation*, The National Prison Project Journal, Vol. 8 No. 2 at 4 (Spring 1993). Lighting in the cells often remains illuminated all day and night. *See* William Collins, U.S. Dep't of Justice, *Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit* at 7 (2004), *available at* http://www.nicic.org/pubs/2004/019835.pdf; *Jones'El v. Berge*, 164 F.Supp. 2d 1096, 1100 (W.D. Wisc. 2001). Cells may be ventilated but not air conditioned, and inmates have no way to regulate the temperature. *See Cold Storage*, *supra*; *see also Jones'El*, 164 F.Supp. 2d at 1100 (noting that during summertime, average cell temperature can reach 92 degrees and heat index goes above 100 degrees); Collins, *supra*, at 7. During wintertime, "the cell temperature drops

to uncomfortable lows." *Jones'El*, 164 F.Supp. 2d at 1100; *see also Cold Storage, supra.*

A few times a week, prisoners are let out for showers and an hour or less of solitary exercise in a small, enclosed space, "in caged-in or cement-walled areas that may be devoid of any equipment and are so constraining they are often referred to as 'dog runs.'" Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49(1) Crime & Delinq. 124, 126 (2003); *see also Ill Equipped, supra,* at 146; Collins, *supra,* at 7. When prisoners are allowed to leave their cells, they are first chained through the door slot while still inside. *See Cold Storage, supra.* They are commonly subjected to strip searches whenever leaving or returning to the housing block. *See* Collins, *supra,* at 7; *Madrid*, 889 F.Supp. at 1229.

Inmates have no access to out-of-cell work, religious activity, rehabilitation, or other programs or activities to occupy time -- such that "[a]lmost complete idleness is the norm." Collins, *supra,* at 6 (noting that "[a]ny available programs are usually offered in the cell or cell front"). At the Pelican Bay SHU in California, "some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo." *Madrid*, 889 F.Supp. at 1229. Telephone and visitation privileges are extremely limited. *See, e.g., Jones'El*, 164 F.Supp. 2d at 1101 (inmates at Wisconsin "supermax" allowed only one six-minute telephone call per month). Visits are non-contact, with the inmates separated from the visitor by a large piece of plexiglass. *See* Human Rights Watch, *Human Rights Violations in the United States: Red Onion State Prison, Super-Maximum Security Confinement in Virginia* (1999), *available at* http://www.hrw.org/reports/ 1999/redonion/. The dearth, and often absence, of simple human contact in "supermax" confinement is stark:



> In the typical facility, cell doors, unit doors, and shower doors are operated remotely from a control center. Physical contact may be limited to being touched through a security door by a corrections officer while being placed in restraints or having restraints removed. The bulk of verbal communication may occur through intercom systems. Further minimalization of human contact may result from the use of technologies such as cameras; remote listening devices; and remote control devices for televisions, water and lights.

Chase Riveland, U.S. Dep't of Justice, *Supermax Prisons: Overview and General Considerations* at 11 (1999), *available at* http://www.nicic.org/pubs/1999/ 014937.pdf.

In sum, prisoners in "supermax" facilities "are completely deprived of . . . personal contact, and mental stimulus." *Ruiz v. Johnson*, 154 F.Supp. 2d 975, 985 (S.D. Tex. 2001). Indeed, because of the advanced modern technology in this environment, "prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past." Haney, *Mental Health Issues, supra,* at 127.[7]

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[7] In some facilities, months of good behavior may lead to increased privileges -- *e.g.*, an increase in the number of photographs an inmate can keep in his cell, or access to an in-cell radio -- but those privileges can be and often are eliminated if the inmate commits an infraction, *e.g.*, is disrespectful to an officer. *See Out of Sight, supra.* In any event, the privileges reflect only a tinkering at the edges of the basic model of solitary confinement and do not significantly ameliorate the conditions. *See id.*

Unlike assignment into such facilities that results from disciplinary action, which generally lasts for a fixed term, administrative segregation of the type at issue in this litigation can, and often does, continue indefinitely until the correction authorities unilaterally decide to release the prisoner back to the general prison population. Some prisoners may serve most, if not all, of their prison terms in isolation. *See* Haney, *Mental Health Issues, supra,* at 127. As a report published by the National Institute of Corrections ("NIC") acknowledges, once placed in "supermax" confinement, an inmate "is likely to remain there for at least 12-24 months, if not longer." Collins, *supra,* at 6.

## II. Prolonged "Supermax" Confinement Produces Significant Adverse Psychological Consequences For Prisoners.

There is no way to measure the misery and suffering produced by prolonged confinement under these conditions. Inmates have described life in a "supermax" facility as akin to living in "a tomb." *Ill Equipped, supra,* at 150. For many prisoners, the absence of normal social interaction, reasonable mental stimulus and exposure to the natural world -- of almost everything that makes life human and bearable -- is emotionally, physically and psychologically destructive. *See id.*

The adverse psychological effects of extended detention in "supermax" facilities can be as severe as they are abundant. "Supermax" facilities create their "own set of psychological pressures" so powerful that "there are few if any forms of imprisonment that produce so many indices of psychological trauma and symptoms of psychopathology in those persons subjected to it." Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment,* Working Paper for From Prison to Home Conference at 14 (2001), *available at* http://www.aspe.hhs.gov/hsp/prison2home02/Haney.htm. These adverse effects include anxiety, chronic depression,



emotional breakdowns, suicidal thoughts and behavior, paranoia, uncontrollable anger, hallucinations, and hypertension. *See* Haney, *Mental Health Issues, supra,* at 130-32. Indeed, many of the psychological effects of this form of confinement "are analogous to the acute reactions of trauma victims, and the psychiatric sequelae fit the common diagnostic criteria for victims of deprivation and constraint torture techniques." Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 530 (1997).

Every published study of non-voluntary "supermax"-like confinement lasting longer than 10 days has reported "negative psychological effects." Haney, *Mental Health Issues, supra,* at 132. For instance, Dr. Haney[8] conducted research at the Pelican Bay SHU, consisting of personal interviews with a random sample of 100 SHU prisoners.[9] He found notably high levels, *inter alia*, of anxiety (91 percent), irrational anger (88 percent), chronic depression (77 percent), emotional swings (71 percent), impending nervous breakdown (70 percent), talking to self (63 percent), and

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[8] Craig Haney, Ph.D., J.D., specializes in the assessment of individual adjustment to and the psychological effects of incarceration. He has been recognized as "perhaps the nation's leading expert in the area of penal institution psychology." *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 908-09 (S.D. Tex 1999).

[9] The Pelican Bay SHU was the subject of the litigation in *Madrid*, 889 F.Supp. at 1231-32, where the court noted that prison confinement could have a deleterious impact on the mental state of prisoners. ("[T]he Court is well satisfied that a severe reduction in environmental stimulation and social isolation can have serious psychiatric consequences . . . .").

violent fantasies (61 percent). *See id.* at 133-34. At a Texas "supermax" facility, "[e]xperts reported that incidents of self-mutilation and incessant babbling and shrieking were almost daily events." *Ruiz*, 154 F.Supp. 2d at 985.

Prisoners with preexisting psychiatric disorders are at even greater risk of suffering psychological deterioration from prolonged "supermax" confinement. The stresses, social isolation and restrictions of such confinement can exacerbate their illnesses or provoke reoccurrences. According to psychiatrist Dr. Terry Kupers, the conditions can cause someone with a vulnerability to psychosis "to go off the deep end." *Ill Equipped, supra,* at 152. A federal district judge trenchantly observed that placing mentally ill or psychologically vulnerable people in "supermax" conditions "is the mental equivalent of putting an asthmatic in a place with little air to breathe." *Madrid*, 889 F. Supp. at 1265; *see also* Haney & Lynch, *supra*, at 534 ("pre-existing psychiatric disorders among segregated prisoners may render them more vulnerable to the psychological assaults of solitary confinement").

As another court has observed, "extremely isolating conditions in supermaximum confinement cause" symptoms such as paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder

> in relatively healthy prisoners who have no histories of serious mental illness, as well as prisoners who have never suffered a breakdown in the past but are prone to break down when the stress and trauma become exceptionally sevère. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide.

*Jones'El*, 164 F.Supp. 2d at 1101-02; *see also Ruiz*, 154 F.Supp. 2d at 984 (finding that Texas "supermax" units "are



virtual incubators of psychoses -- seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities").

The threat that these facilities pose, particularly to those already prone to mental disorders, is a serious one, because the risk that mentally ill prisoners will end up in supermaximum security units is great. Corrections officials frequently place mentally ill inmates in "supermax" confinement because they lack other housing options, such as secure mental health treatment units or segregation units specifically designed for mentally ill offenders. Moreover, persons with mental illness often have difficulty complying with strict prison rules and controlling their behavior. As a result, the mentally ill are disproportionately represented among prisoners in "supermax" units or facilities. *See Ill Equipped, supra,* at 147-48.

As the NIC has itself recognized, "[t]he very environment that offers the security and control appropriate for dealing with the type of behavior such inmates exhibit may make their mental condition worse." Collins, *supra,* at 16. These findings, as the NIC has acknowledged, "virtually compel the conclusions that corrections departments need effective screening procedures to prevent certain inmates from ever entering the ECU." *Id.* at 18.

The need for careful procedures to prevent the imposition of these horrific dangers on those for whom it is unjustified is not limited to those who already suffer from mental disabilities. After completing a study of the effects of confinement on prisoners at Pelican Bay, Dr. Haney concluded that although prisoners who entered the prison with preexisting mental health problems suffer more acutely, "[t]his kind of environment is capable of creating clinical symptoms in even healthy personalities, and can be psychologically destructive to anyone who enters and endures it for significant periods of time." Haney, *Infamous Punishment* at 6; *see also Madrid*, 889 F. Supp. at 1267

(conditions at Pelican Bay "press the outer bounds of what most humans can psychologically tolerate. . . .").

## III. Under These Circumstances, The Constitutional Principles Of Due Process Require At A Minimum The Procedural Protections That The Courts Below Properly Found Lacking In The Ohio State Penitentiary.

Corrections officials justify the extreme deprivations of "supermax" confinement as necessary to confine inmates so dangerous and disruptive that they cannot be safely confined in general population. *See Cold Storage, supra.* These inmates are supposed to be the "worst of the worst" of prisoners. Collins, *supra,* at 6.

> Corrections authorities must be able to exercise discretion and professional judgment in choosing where to confine inmates, but the exercise of such discretion carries the inherent risk of arbitrariness or error. Because of the extreme nature of supermax conditions, particular precautions are needed to minimize those risks and to ensure that no inmate is sent to, nor kept unnecessarily in, supermax confinement.

*Out of Sight, supra.* In practice, few correctional systems have adequate internal review systems to provide a check on unnecessary "supermax" confinement. Some jurisdictions do not provide inmates with a hearing, or if hearings are provided, they are meaningless formalities. *See id.* An NIC survey of prison systems revealed that the percentage of prisoners housed in "supermax" facilities varies greatly, ranging from less than one percent in some states to more than 20 percent in others -- "rais[ing] the question of whether some jurisdictions may be overclassifying inmates into very expensive prison beds." Collins, *supra,* at 6.



With empty beds in "supermax" facilities and overcrowding elsewhere, corrections systems face overwhelming temptations to send inmates there whose disciplinary histories do not demonstrate the need for such stringent conditions -- *e.g.* inmates who are nuisances. *See Cold Storage, supra*; *Red Onion State Prison, supra*; Kurki & Morris, *supra*, at 385, 389, 392. Particularly problematic is the fact that "many prisoners are placed in supermax not specifically for what they have done but rather on the basis of who someone in authority has judged them to be (e.g., 'dangerous,' 'a threat,' or a member of a 'disruptive' group)." Haney, *Mental Health Issues, supra,* at 127.[10] As a result, "[a]dministrative segregation often amounts to a kind of correctional 'no man's land' in which prisoners are kept segregated and often isolated for reasons of administrative discretion and sometimes mere convenience or unspecified punitive purposes." Haney & Lynch, *supra*, at 561 n.429.

Use of "broad assignment criteria" creates the very real danger that, unchecked by procedural safeguards designed to ensure decisionmakers have as complete a record before them as possible, assignments will be made in order to fill "supermax" facilities, "rather than providing safeguards against arbitrary and unnecessary admissions, as was their original purpose."[11] Kurki & Morris at 389, 392.

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[10] Such common admission criteria include gang activity or disruption of orderly prison operation. *See* Kurki & Morris, *supra,* at 389.

[11] Even with procedural protections, many correctional authorities use overly broad and vague criteria for determining supermax eligibility and fail to exercise appropriate control over placement decisions. As a result, inmates across the country have been placed in "supermax" facilities even where such conditions are excessive in light of

*(Footnote continued)*

The district court in the instant case found this very problem present in the Ohio system: Because of the temptation to fill the "surplus" of "supermax" units, "Ohio risks having a 'because we have built it, they will come' mind set." *Austin v. Wilkinson*, 189 F.Supp. 2d 719, 724 (N.D. Ohio 2002). Consequently, prison administrators "consider inmates for placement [in 'supermax'] who do not need its level of restrictions." *Id.; see also Cold Storage, supra.*

The NIC has acknowledged that "the extraordinarily high levels of security in ['supermax' facilities] -- and the restrictions that go with that security -- mean that these facilities sometimes function at the limits of what is constitutionally acceptable." Collins, *supra,* at xv. For this reason, among others, an NIC report has endorsed the idea of "limiting the use of extended control housing to inmates who present a 'clear and present danger.'" Riveland, *supra,* at 6.

As the NIC implicitly acknowledged, decisions to place an inmate in "supermax" facilities are not just routine "housing" decisions. The extreme deprivations and the grave psychological impact of "supermax" on many prisoners constitute an "atypical and significant hardship" as envisioned under *Sandin* -- "the risk of an erroneous deprivation ...." of the liberty interest in avoiding confinement there could not be greater. *Mathews*, 424 U.S. at 335; *see also* Collins, *supra,* at 51 ("It is not surprising

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their behavior. *See Out of Sight, supra*. Indeed, inmates are assigned to "supermax" confinement for relatively minor disciplinary infractions, such as verbally insulting a guard, throwing water at (and missing) a guard, or covering up cell windows while washing. *See* Amnesty International, *USA: A Briefing for the UN Committee against Torture* at 23 n.45 (2000), *available at* http://web.amnesty.org/library/index/engamr510562000.



that courts would regard ECU placement -- with its typically long duration, very strict conditions, and limited privileges -- as an atypical deprivation, compared to the ordinary conditions of prison life").

Under such circumstances, a fair and thorough procedural mechanism for evaluating prisoners is the only means to guarantee that assignment to "supermax" is proper and properly limited in duration. *See* Collins, *supra,* at 51 ("placement process that includes due process procedures . . . furthers the . . . goal of basing ECU placements on reliable information and sound judgment"); Riveland, *supra*, at 2 ("Caution in expanding the types and number of inmates placed in these facilities will serve all parties well.").

The need for the decisionmaker to make a "predictive" decision does not change the importance of an accurate factual predicate on which the decisionmaker will act. The danger of exposing prisoners to the grueling conditions of "supermax" confinement for extended periods, functioning at best "at the limits of what is constitutionally acceptable," warrant -- and, in fact, demand -- that the process be structured to do everything possible to make sure the decisionmaker gets it right. In the United States, the goals of fairness and accuracy are obtained through procedural protections -- the type of procedural safeguards that the district court found necessary and that the Sixth Circuit affirmed in this case.

## IV. Procedural Safeguards Are Required To Protect The Internationally Recognized Human Rights Of Prisoners.

### A. Principles Of International Law Properly Inform And Illuminate American Constitutional Jurisprudence.

International law and opinion, although not binding upon the courts of the United States, instruct and illuminate American constitutional jurisprudence. *See Sosa v. Alvarez-*

*Machain*, 124 S. Ct. 2739, 2764 (2004) ("For two centuries [this Court] has affirmed that the domestic law of the United States recognizes the law of nations") (internal citations omitted). Just this week, in *Roper v. Simmons*, this Court stated: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, No. 03-633, 2005 U.S. Lexis 2200 at * 48-49 (March 1, 2005). This articulated principle continues the tradition of this Court looking "within the world community" when faced with complex constitutional issues, "considering the views of 'respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.'" *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 n.31 (1988)); *see also Edmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) ("'climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant'") (quoting *Coker v. Georgia*, 433 U.S. 584, 596, n.10 (1977)). In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court, in overturning certain criminal statutes as applied to activities of consenting adults, noted that the "right of homosexual adults to engage in intimate, consensual conduct . . . has been accepted as an integral part of human freedom in many other countries." 539 U.S. at 576-77. In reaching its holding in that case, the Court cited with approval decisions of the European Court of Human Rights, because they reflect "values we share with a wider civilization." *Id.* at 573, 576.

This consideration of international law and opinion is particularly apt in discussing the nature of constitutionally mandated due process in the assignment to and review of confinement in "supermax" facilities. The fair and just treatment of prisoners is an issue that spans all continents and resonates across the globe. A review of international



law and opinion on the issue before the Court, moreover, unquestionably reinforces the importance of providing the highest levels of due process protections to ensure that prisoners are assigned to "supermax" facilities only when and where the circumstances meet the justification offered for their use.

### B. "Supermax" Facilities Raise Serious Human Rights Concerns.

The conditions in "supermax" facilities, as with conditions in any other prisons, are "subject to human rights standards contained in treaties signed by the United States and binding on state and federal officials." *Out of Sight, supra.*

These standards were first enunciated in the *Universal Declaration of Human Rights*, G.A. res. 217A (III), December 10, 1948, of which the United States is a signatory. Article Five of that Declaration states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." To similar effect, the *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), December 16, 1966, ratified by the United States in 1992, states in Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 10 further provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[12] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UN Convention") also states, in Article 16: "Each Party State shall undertake to prevent . . . acts of cruel, inhuman or degrading treatment or

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[12] Article 10 requires that "the reform and social rehabilitation of prisoners" be an "essential aim" of imprisonment.

punishment. . . ." *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* , G.A. res. 39/46, December 10, 1984. *See also European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,* (E.T.S. 126, Nov. 26, 1987), *Historical Background and Main Features of the Convention,* Ref.: CPT/inf/C (89)(2) ("European Convention") ("the Convention's aim is to strengthen the protections of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment").

### C. Human Rights Experts Agree That Extensive Procedural Protections Are Essential And Must Accompany Assignment To "Supermax" Facilities.

#### 1. The United Nations Committee Against Torture And The European Committee For The Prevention Of Torture And Inhuman Or Degrading Treatment Or Punishment

In response to a report submitted by the United States, that discussed, *inter alia*, "supermax" conditions, the United Nations Committee against Torture ("CAT")[13] expressed its concerns about "the excessively harsh regime of the 'supermaximum' prisons" within the United States. *Consideration of Reports Submitted by State Parties Under*

[13] CAT is established pursuant to the UN Convention and "consists of experts of high moral standing and recognized competence in the field of human rights." *UN Convention*, Article 17. Countries that have ratified the Convention are required to submit to CAT "reports on the measures that they have taken to give effect to the undertakings of the Convention. . . ." *Id.*, Article 19. CAT may comment on a report "as it considers appropriate. . . ." *Id.*



*Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture: United States of America*, A/55/44, ¶¶ 175-180 at ¶ 179(f) (May 15, 2000). Additional guidance as to how the principles of international law apply to the issues before this Court can be found in the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), established under the European Convention, and which is recognized as an influential source of minimum standards for the treatment of prisoners. Since 1990, the CPT has carried out 189 prison visits in 46 member States and, as a result of those visits, has developed minimum standards relating to humane treatment of prisoners, set forth in the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) CPT Standards, Substantive Sections of the CPT 's General Report* CPT/INI/E (2002) 1-Rev. 2004 (CPT Standards).[14]

The CPT acknowledges "that in every country there will be a certain number of prisoners who present particularly high security risks and hence require special conditions of detention." *Id.* at 27. It is this group of prisoners "that is of particular concern to the CPT, as the need to take exceptional measures . . . brings with it a greater risk of inhuman treatment." *Id.* "The CPT pays particular attention to prisoners held, for whatever reason," including as a result of their "dangerousness" or their "troublesome"

[14] The CPT is composed of experts in the field of human rights or prison or police matters. It examines the treatment of prisoners in member countries through on-site visits to prisons, "with a view to strengthening the protection of such persons from torture and from inhuman or degrading treatment or punishment." *European Convention, Chapter I, Article 1.*

behavior," under conditions "akin to solitary confinement." *Id.* at 20. Such isolated confinement, according to the CPT, can severely impair physical and mental health. *See Cold Storage, supra.*

Because of the serious deprivations and potential damage caused by confinement of this sort,[15] the CPT has

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[15] The CPT recognizes that "[s]olitary confinement can, in certain circumstances, amount to inhuman and degrading treatment." *CPT Standards* at 20. It has further recognized, reflecting the same conclusions as reached in the studies cited above, *supra* pp.12-16, that "all forms of solitary confinement, without appropriate mental and physical stimulation, are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities." *Id.* Echoing the particularly strong evidence of damage to those with pre-existing mental conditions, the CPT recommends that "no mentally-ill person be held in such a unit." European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Portuguese Government on the visit to Portugal, from 14 to 26 May 1995*, CPT/Inf (96) 31 [EN] (1996). The CPT has also recognized other aspects of this type of imprisonment that must be carefully circumscribed and monitored. *See CPT Standards* at 27 (finding that "because it can do much to counter the deleterious effects on a prisoner's personality, . . . a satisfactory program of activities, including education, sports and work of a vocational nature, to be just as important -- if not more so -- in a high security unit than on normal location"). "Moreover, even when specific security measures are required, such measures should never involve depriving the prisoners concerned of natural light and fresh air." *Id.* at 25. These "are basic elements of life which all prisoners are entitled to." *Id.*



stated that when making a decision about whether to subject a prisoner to placement in such solitary confinement, "the principle of proportionality calls for a balance to be struck between the requirements of the situation and the imposition of a solitary-confinement-type regime." *CPT Standards* at 20. "It is axiomatic that prisoners should not be subject to a special security regime any longer than the risk they present makes necessary." *Id.* at 28; *see also* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Finnish Government on the visit to Finland, from 10 to 20 May 1992*, CPT/Inf (93) 8 [EN] (1993). ("the mental and physical state of all prisoners placed in solitary confinement must be the subject of special attention").

In order to avoid erroneous or unnecessary assignment to or continued confinement in solitary conditions, the CPT recommends that any decision to subject a prisoner to high security units be accompanied by certain procedural safeguards -- "[t]he prisoner should be informed of the reasons for the measure taken against him, be given an opportunity to present his views on the matter before a definitive decision is taken, and be able to contest the measure before an appropriate authority." *CPT Standards* at 19. The CPT further recommends a full review of the necessity of the classifications and security measures, for each prisoner, at least every three months "by staff specially trained to carry out such an assessment." *Id.* at 28. The procedures recommended by the CPT are the very type of protections that the court below sought to ensure were provided to the prisoners subject to confinement by the OSP in its "supermax" facilities.

### 2. International Human Rights Organizations

According to Human Rights Watch, a human rights assessment of "supermax" confinement requires three key factors: eligibility criteria, specific conditions and the

duration of confinement, with each considered in relation to the other. *See Out of Sight, supra.*

> Extreme restrictions and controls that might be considered reasonable in dealing with incorrigibly violent inmates become excessive for inmates who are not. Deprivation of sources of stimulation, human contact and activity that may not be unbearably cruel for some inmates can become torture when imposed on mentally ill inmates. Harsh conditions that might not be unacceptable for a month or two become inhumane and degrading when imposed for years.

*Id.*

Human Rights Watch has developed detailed recommendations addressing all three of these factors which, if followed, would reduce the current conflict between "supermax" confinement and respect for human rights of inmates. These recommendations expressly address the procedural protections necessary to ensure inmates are not unnecessarily placed in supermaximum confinement. Human Rights Watch insists that prisoners should not be confined in such conditions except when their behavior has shown them to be so chronically violent or dangerous and to pose such a demonstrable, extremely serious threat to prison safety and security that prison officials have no other choice. Even then, confinement in "supermax" should be for the shortest period of time possible in light of legitimate security and safety considerations. Moreover, inmates should have meaningful opportunities to both contest assignment to or continuation in "supermax" confinement and appeal those decisions. All inmates should be given a written, detailed and individualized explanation of the specific reasons for their initial and continued "supermax" confinement and have the right to meaningful periodic review. *See Out of Sight, supra.*



Similarly, Amnesty International has recommended that "authorities in supermax units amend their policies to . . . establish clear criteria for and regular review of placement in supermax prisons." *Amnesty International's Recommendations to the United States Government to Address Human Rights Violations in the USA* (August 1, 1998), *available at* http://web.amnesty.org/library/index/engamr510461998.[16]

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[16] The concerns of these organizations with regard to "supermax" facilities in the United States are not limited to the process by which prisoners are assigned to these facilities and by which they are kept there for extended periods of time. Like Human Rights Watch, Amnesty International has expressed grave concern about the proliferation of "supermax" facilities in the United States. While recognizing that "it is sometimes necessary to segregate prisoners for safety or security reasons," Amnesty International has found "conditions in many U.S. supermax facilities [] far more punitive than is required for legitimate security purposes and constitute cruel inhuman and degrading treatment in violation of international standards." *A Briefing for the UN Committee against Torture* at 22. Many of the conditions typical of "supermax" confinement contribute little or nothing to the overall security of a facility. Lack of windows, and access to fresh air and light, denial of reading material, lack of outdoor recreation, lack of in-cell as well as out-of-cell education and training programs, provide no added security. Such deprivations can only be explained as reflecting an unwillingness to acknowledge an inmate's basic humanity and thus violate basic tenets of international law. *See Cold Storage, supra.* Moreover, many "supermax" units or facilities breach the specific standards contained in the United Nations Standard Minimum Rules for the Treatment of Prisoners, including those specifying the need

*(Footnote continued)*

* * *

In sum, international human rights principles -- as well as the application and interpretation of those principles by international courts, official bodies, and established human rights organizations -- reinforce the conclusion that, to the degree "supermax" prisons are permitted to be used, the greatest possible care must be taken to ensure that only persons requiring confinement in such facilities are assigned to them and that persons remain in those facilities only so long as is necessary.

Under our constitutional system, the procedural protections of due process of law are the mechanisms upon which our Nation relies to ensure the kind of accurate and fair decisionmaking that principles of International Law require before these extreme conditions are imposed on prisoners. In this case, the courts below correctly found the system that OSP had for placement to be wanting in this critical regard, and imposed minimum requirements to

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for windows, natural light, fresh air and daily outdoor exercise. *See A Briefing for the UN Committee against Torture* at 23. Like Human Rights Watch, Amnesty International is especially concerned about the severe psychological damage caused by prolonged isolation and reduction of sensory stimulation, particularly on mentally ill or disturbed prisoners who continue to be held in "supermax" facilities without adequate treatment or monitoring, despite the documented deleterious affect of "supermax" confinement on the mentally ill. *See* Amnesty International, *Open Letter to the President of the United States from Amnesty International following Hearings Held by the United Nations Committee against Torture* (June 22, 2000), *available at* http://web.amnesty.org/library/index/engamr511072000.



Constitution -- require nothing less in these circumstances of extreme deprivations and degradation, as well as extreme psychological and emotional risk.

## CONCLUSION

For the foregoing reasons, Amici Curiae Human Rights Watch, American Friends Service Committee, Bluhm Legal Clinic, The Center for Justice In Capital Cases, Illinois Association of Criminal Defense Lawyers, and National Lawyers Guild respectfully submit that the judgments of the courts below should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR,
OHIO DEPARTMENT OF REHABILITATION
AND CORRECTION, ET AL.,
*Petitioners,*

v.

CHARLES E. AUSTIN, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF PERCY PITZER, IN SUPPORT OF RESPONDENTS

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## TABLE OF CONTENTS

Table of Authorities ..... ii

Interest of Amicus Curiae ..... 1

Summary of Argument ..... 1

Argument ..... 2

I. The Process Extended To Federal Inmates Prior To Assignment In the Control Unit at USP Marion Was Equivalent To That Contemplated By The Lower Courts In This Case ..... 3

II. Procedural Protections Of The Sort Ordered By The Lower Courts Serve Important Penal Interests ..... 7

Conclusion ..... 8

## TABLE OF AUTHORITIES

*Austin v. Wilkinson*, 204 F. Supp. 2d 1024 (N.D. Ohio 2002)..... 6

28 C.F.R. §§ 541.41, et seq.....*passim*

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*Marion – 1985: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 99th Cong. 26 (1985)..... 2

William C. Collins, U.S. Dep't of Justice, Nat'l Inst. of Corr., *Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit* (2004)..... 2



## INTEREST OF *AMICUS CURIAE*[*]

*Amicus* served as an employee of the Federal Bureau of Prisons for over twenty-five years. From 1987 to 1989, he served as Manager of the Long Term Control Unit at the United States Penitentiary at Marion, Illinois. At that time, the Control Unit was the most restrictive prison setting in the entire federal correctional system. *Amicus* currently consults and provides expert testimony regarding corrections security and management throughout the country.

## SUMMARY OF THE ARGUMENT

The lower federal courts in this case have ordered Ohio to run its super-max facility essentially the same way we ran the Control Unit at Marion. Procedural protections such as notice, hearings, written decisions, and specific criteria for exit from the Control Unit are neither burdensome nor unwieldy. These procedures also advance important correctional goals by allowing inmates and correction staff to know, understand, and accept their respective roles and responsibilities within the unit. They worked at Marion, and they will work in Ohio.

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[*] Counsel for all parties have consented in writing to the filing of this brief, and *amicus* has filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amicus* and his counsel, has made a monetary contribution to this brief's preparation and submission.

## ARGUMENT

As is well known, the United States Penitentiary at Marion, Illinois, was created in 1963 to replace the USP at Alcatraz, California. *See generally Marion – 1985: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. 26 (1985). It was built to house approximately 500 high-security inmates. Ten years later, the Long Term Control Unit was created within Marion to house approximately 50 to 60 inmates considered to be too dangerous to keep in the general population of any correctional facility—the worst of the worst. *Id.* at 357-58.

The Control Unit was the first super-maximum security (or "supermax") facility in the country.[1] Until the Administrative Maximum Unit at Florence, Colorado, was opened in 1994, the Control Unit at Marion was the most restrictive facility in the federal system and the one of the most restrictive units in the nation. *See* Comm. to End the Marion Lockdown, *From Alcatraz to Marion to Florence—Control Unit Prisons in the U.S.* (1992), *at* www.unix.oit.umass.edu/~kastor/ceml_articles/cu_in_us.html (last visited March 1, 2005). *Amicus* was manager of this unit from 1987 to 1989.

[1] Today, "supermax" facilities go by many names including extended control units (ECUs), special housing units (SHUs), special management units (SMUs), intensive management units (IMUs), and maxi-maxis. *See* William C. Collins, U.S. Dep't of Justice, Nat'l Inst. of Corr., *Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit*, at 5-6 (2004). Despite the differences in nomenclature, all such institutions share a common purpose—to remove the most dangerous offenders from the general population. *Id.*



### I. The Process Extended To Federal Inmates Prior To Assignment In the Control Unit at USP Marion Was Equivalent To That Contemplated By The Lower Courts In This Case

Inmates came to the Control Unit from institutions throughout the federal system. These inmates were never assigned to the Control Unit by chance, nor were they sent to the Control Unit directly from sentencing. On the contrary, during my tenure at Marion, inmates arrived at the Control Unit only after a comprehensive procedure instituted by the BOP to guarantee order and stability within the federal prison system. This procedure included several stages, including two chances for the inmate to appeal an adverse decision.

The road to the Control Unit usually began with one or more violent disciplinary infractions at another facility. These infractions would lead to an investigation, a full disciplinary hearing, and some form of punishment. It is important to note that no person came to the Control Unit without a prior disciplinary determination, after notice and a hearing, that he had committed a violent disciplinary violation.

In some cases, typically involving a recidivist inmate, the Warden of the prisoner's institution concluded the prisoner presented a threat to the safety or stability of the institution. In that case, the Warden could refer the inmate to the Regional Office for consideration for placement at the Marion Control Unit. *See* 28 C.F.R. § 541.41(a) (2005). When making a referral, the Warden was obligated to consider several "factors." *Id.* at § 541.41(b). But "factor" is a misleading term—the Warden's discretion was essentially limited to consideration of any disciplinary violations during confinement and/or escape attempts.[2] *Id.* The referral

[2] Indeed, the warden was expressly prohibited from considering the nature of the offense for which the inmate was convicted (unless considered in conjunction with an escape or disciplinary infraction). 28 C.F.R. §

package included the Warden's written statement justifying the placement, the inmate's file, and a complete account of the underlying disciplinary infraction, including all investigative reports and disciplinary findings.

Upon receiving a referral, the Regional Office would convene a Committee to review the referral package. *Id.* at § 541.42(a). The Committee would ordinarily consist of three people, and usually included both the Regional Programs Manager and the Regional Correctional Services Administrator. The Committee would then convene a hearing with the inmate. *Id.* at §§ 541.43(a), 541.43(b)(3). The inmate would receive notice of the hearing at least 24 hours in advance, including a list "of the specific act(s) or other evidence which forms the basis for" the referral. *Id.* at § 541.43(b)(1). The Committee would provide the inmate with a representative to assist in presenting his case if he so desired. *Id.* at § 541.43(b)(2).

At the hearing, the inmate could present documentary evidence and could call witnesses. *Id.* at § 541.43(b)(4). At the end of the hearing, a written recommendation was prepared which provided "specific reasons for the decision, [including] a description of the act, or series of acts, or evidence on which the decision is based." *Id.* at §541.44(a)(2). The recommendation was given to the inmate as a matter of course, unless there were security reasons to justify confidential treatment. *Id.* at § 541.44(b). Both the Committee's recommendation and the underlying referral package would then be forwarded in writing to the Regional Director. *Id.* at § 541.44(c).

The Regional Director would decide whether to authorize placement at the Control Unit. In making this decision, the

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541.41(b)(6-7) (2005). Moreover, the warden was prohibited from referring "protective" cases or inmates with mental or physical disabilities. *Id.* at § 541.41(c)(1-2).



Regional Director could disregard either the Warden's referral, or the Committee's recommendation, or both. Overturning the Committee's recommendation was uncommon, however, and in the event of such a decision, a written explanation would be provided to the inmate. *Id.* at § 541.45(b). If the Regional Director determined that the inmate should be placed at the Control Unit, the inmate could appeal through the Bureau of Prisons' Administrative Remedy Process, in which case the final decision would ultimately be made by the BOP Office of General Counsel. *Id.* at § 541.45(c). The appeal, however, would not delay the inmate's transfer to the Control Unit, which would take place as soon as practicable after the Regional Director had made his decision.

Upon arrival at the Control Unit, the inmate would be assigned a "team," which usually consisted of three or more people, including myself. The team would meet with the prisoner almost immediately after his arrival. The purpose of this meeting was to orient the inmate to life in the unit. At the meeting, the inmate was informed what behavior was expected of him, what activities were acceptable, and what the criteria for release were. *Id.* at § 541.45(c-f). Most importantly, the team would inform the inmate how long he was to remain in the Control Unit. *Id.* at § 541.47(a). We would also explain to the inmate that the actual length of his stay in the unit may be substantially longer, depending on his behavior. The inmate knew that if he behaved, he would not spend one day at the Control Unit beyond what we had set for him when he arrived.

This was a critical part of life at the Control Unit. In my experience, almost any inmate – no matter how violent – can be managed without a lot of trouble if he understands three things: why he's there; how long he'll be there; and what it takes to get out. At the Control Unit, the inmate knew each of these things from the outset. He knew why he was there, the minimum length of time he would be at the unit, and what it

took for him to get out. In that way, he understood that his future was at least partially in his own hands, which provided an important protection against arbitrary enforcement, and an incentive for him to behave.[3]

Finally, there were two levels of ongoing review. First, the "teams" would meet with their assigned inmates at least every thirty days to address the inmate's progress. *Id.* at § 541.49(a). Additionally, the Executive Panel conducted an administrative review approximately every 60 days. *Id.* at § 541.49(d). The review provided an opportunity for inmates to appear before a panel that included the Assistant Director, the Regional Director, the Warden at Marion, myself, and the inmate's case manager. At this meeting, the inmate was free to air any grievance he may have about his treatment, including perceived unfairness in his discipline or the conditions of his confinement. The right to appear was given to every inmate in the unit, and in my experience about one third of the unit would attend each review.

In my experience, the whole system worked extremely well. There was a process in place, and we followed it. The inmates dealt with the reality of life in the unit, and the staff dealt with the due process. In addition, these procedures seem to correspond with what was ordered by the lower courts in this case. The district court ordered that the inmate be given notice, including all the grounds for the assignment to the supermax unit, *Austin v. Wilkinson*, 204 F. Supp. 2d 1024, 1026 (N.D. Ohio 2002), that the inmate be allowed to present evidence and call witnesses, *id.*, that the proceedings be recorded, *id.*, that the inmate be given a written decision that informed him of the reasons for the decisions and were

[3] The average assignment was typically between 36-42 months. Even in extraordinary circumstances where the team decided that the inmate needed to spend the rest of his sentence in the unit, such decisions were made clear to the inmate. In no circumstance was the inmate left in the dark regarding the length of his stay at the unit.



not simply boilerplate, *id.* at 1027, that the inmate be allowed to appeal, *id.*, that any decisions made at the appellate level be written, *id.*, and that the inmate's status be reviewed once a year, *id.* at 1028. The Bureau of Prisons provided that process and more.

Given the rough equivalency of the process involved, it seems clear to me that the district court's order is neither burdensome nor unwieldy. In fact, procedures of this type make the administration of a supermax facility easier, not harder.

## II. Procedural Protections Of The Sort Ordered By The Lower Courts Serve Important Penal Interests

The procedures ordered below serve important interests in the prison setting. First, making sure that the inmates in a control unit understand what it will take, in terms of both time and behavior, to be moved to a less restrictive facility is critical. In my experience, withholding this information from an inmate undermines his respect and regard for the prison staff and increases his resentment. An inmate in such a situation views his time in the Control Unit as arbitrary. On the other hand, an inmate who knows what is expected can learn to conform to the requirements of his confinement.

Put another way, up-front disclosure of what is needed to exit the unit creates an incentive for the inmate to behave, thereby reducing violence and chaos in the unit. An inmate who has no set expectations does not see value in good behavior. But an inmate who knows that he needs 40 months without an incident report will value his disciplinary status. The value of processes that allow for this sort of understanding, like those ordered by the courts below, cannot be overstated.

Second, the control unit facilities are a limited resource, and the correctional system has an interest in making sure that those spaces are reserved for the worst of the worst. The modest procedural requirements called for by the district court in this case – including notice to the prisoner, a meaningful opportunity for him to be heard in an open process, followed by a reasoned decision – helps to ensure that inmates who do not require administrative segregation stay in other facilities *and* that those who present the gravest threat are removed and segregated.

## CONCLUSION

Because the process ordered by the district court is neither novel nor burdensome, and because it helps further important correctional goals, *amicus* asks that the Court affirm the decision below.

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In The

# Supreme Court of the United States

REGINALD S. WILKINSON, *et al.*,

*Petitioners,*

v.

CHARLES E. AUSTIN, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF PROFESSORS AND PRACTITIONERS OF PSYCHOLOGY AND PSYCHIATRY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## TABLE OF CONTENTS

Table of Authorities ..... i

Statement of Interest of *Amici* ..... 1

Summary of Argument ..... 4

ARGUMENT

I. Protracted Supermax Confinement Represents a Serious Psychological Stressor and Imposed Significant Psychological Pain ..... 6

II. There Is a Serious Risk of Psychological Harm for Some Persons Created by Prolonged Exposure to the Stress of Extreme Isolation ..... 14

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

**Cases:**

*Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002) ..... 6, 23

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## STATEMENT OF INTEREST OF *AMICI*[1]

We are professors and practitioners of psychiatry and psychology. Each of us has extensive experience studying the psychology of imprisonment and/or treating prisoners who are in penal confinement. We are professionally knowledgeable about the psychological effects of a range of different prison conditions in the United States and many foreign countries. More specifically, we have background, experience, and expertise in analyzing the special psychiatric and psychological problems that arise in the course of isolated confinement in what has come to be called "supermaximum" security prisons.

Stanley L. Brodsky, Ph.D., is Professor of Psychology at The University of Alabama where he coordinates the doctoral concentration in Psychology-Law. He is editor or author of eleven books and hundreds of articles and scholarly presentations. He has worked as Chief of Psychology at the United States Disciplinary Barracks in Fort Leavenworth, Kansas, inspected solitary confinement facilities in eight states as part of his clinical-forensic work, and conducted research and clinical assessment interviews for prisoners in a variety of isolation conditions.

Professor Carl Clements, Ph.D., has taught and published in the field of correctional psychology for 30

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that the only person or entity other than counsel for *amici* who has made a monetary contribution to the preparation and submission of the brief is John Boston.

years and has inspected dozens of US prisons in regard to the effects of overcrowding, offender classification procedures, and the mental health needs of prisoners. He has testified in numerous conditions of confinement cases (e.g., Alabama, New Mexico, Rhode Island) especially regarding the negative impact of lock-down, severely restrictive protective custody, and over-reaching and invalid offender classification systems.

Keith R. Curry, Ph.D., is a clinical psychologist in Washington, DC, with extensive expertise in conditions of confinement. For nearly twenty years he has evaluated jail and prison conditions and their effects on mentally ill inmates, including the cyclical interaction of mental illness and segregation for inmates with severe psychopathology.

Karen Froming, Ph.D., is a clinical psychologist, board certified neuropsychologist and Assistant Clinical Professor of Psychiatry at the University of California, San Francisco and the Pacific Graduate School of Psychology. She has extensive experience evaluating individuals who have been subjected to severe prison conditions producing behavioral problems, psychiatric, and neuropsychiatric conditions. Her specialties include the study of emotion processing by the brain in conditions of extreme stress.

Carl Fulwiler, M.D., Ph.D., is a board-certified psychiatrist and neuroscientist and is Assistant Professor of Psychiatry at the University of Massachusetts Medical School and Tufts University School of Medicine. His clinical specialty is the diagnosis and treatment of mental illness among inmates and former inmates and his research focuses on



the causes of violent behavior by the mentally ill. He has extensive experience with the mental health effects of isolated confinement, having interviewed over two hundred inmates in over a dozen segregation units.

Craig Haney, Ph.D., J.D., is Professor of Psychology at the University of California, Santa Cruz and the principal author of this Brief. One of the researchers in the "Stanford Prison Experiment,"[2] he has been studying actual prison conditions for the more than thirty years since then. He has toured and inspected numerous prisons, including many supermax facilities, in the United States, and has written extensively about the psychological effects of this form of confinement.

Pablo Stewart, M.D., is a psychiatrist with over 20 years experience working within the criminal justice system, including ten years as the federal court appointed psychiatric expert in two cases focusing on the effects of supermax confinement on the mental health of inmates, and as a consultant to the New Mexico Department of Corrections concerning the mental health needs of prisoners in supermax confinement. He currently is a psychiatric and medical consultant with the Department of Justice, Civil Rights Division, for whom he inspects prison facilities around the country.

Hans Toch, Ph.D., is Distinguished Professor of Criminal Justice at the State University of New York at Albany, and has written numerous texts considered "classics" in the psychology of imprisonment, as well as hundreds of articles about prison-related topics. He has

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[2] Craig Haney et al., Interpersonal Dynamics of a Simulated Prison, 1 *Int'l. J. Criminology & Penology* 69 (1973).

served as a consultant to a number of correctional systems in the United States and elsewhere, and has received many awards for distinguished contributions to criminology and penology.

## SUMMARY OF ARGUMENT

Because of the extraordinary nature of extremely isolating "supermax" confinement—including the type that has been described as being practiced at Ohio State Penitentiary (OSP)—and the significant risk of psychological harm it creates for some prisoners, we conclude that these conditions impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Indeed, long-term solitary confinement, in widespread use over a century ago, was abandoned largely because of its harmful psychological effects. Especially in its more modern supermax form, there is nothing "typical" about it. In addition, the literature that we review clearly documents that supermax confinement imposes a significant "hardship" in the form of grave psychiatric and psychological risks to prisoners. No study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects. Moreover, research raises significant doubts about the ability of supermax prisons to achieve their goal of reducing violence in prison systems. Prisoners have a clear liberty interest, as this Court has defined it, in insuring that they are not exposed to such risks on the basis of mere conjecture, or absent a meaningful opportunity to contest the basis for their supermax confinement.



Since *Sandin* shifted the focus of the due process inquiry to the nature and severity of the conditions to which prisoners are subjected, we address those conditions and their effects in psychiatric and psychological terms. As one analysis of the nature of the supermax environment noted:

> To summarize: prisoners in these units live almost entirely within the confines of a 60 to 80 square foot cell, can exist for many years separated from the natural world around them and removed from the natural rhythms of social life, are denied access to vocational or educational training programs or other meaningful activities in which to engage, get out of their cells no more than a few hours a week, are under virtually constant surveillance and monitoring, are rarely if ever in the presence of another person without being heavily chained and restrained, have no opportunities for normal conversation or social interaction, and are denied the opportunity to ever touch another human being with affection or caring or to receive such affection or caring themselves. Because supermax units typically meld sophisticated modern technology with the age-old practice of solitary confinement, prisoners experience levels of isolation and behavioral control that are more total and complete and literally "dehumanized" than has been possible in the past. The combination of these factors is what makes this

> extraordinary and extreme form of imprisonment unique in the modern history of corrections.[3]

In all but a few respects—some that appear to improve conditions and some that appear to make them worse—the OSP environment conforms to this general description.[4]

## ARGUMENT

### I. PROTRACTED SUPERMAX CONFINEMENT REPRESENTS A SERIOUS PSYCHOLOGICAL STRESSOR AND IMPOSES SIGNIFICANT PSYCHOLOGICAL PAIN.

Prolonged or long-term involuntary solitary confinement constitutes a significant, painful, and potentially damaging psychological stressor. Strong empirical support for this proposition comes from a variety of sources.

Some direct evidence on the effects of this kind of punishment is part of the historical record of long-term solitary confinement used a century or more ago. Its effects were drastic enough to lead nineteenth-century officials to abandon the practice.[5] Thus, the first block of

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[3] Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 *Crime & Delinquency* 124, 127 (2003).

[4] *Amici* rely on the District Court's description of these conditions. Austin v. Wilkinson, 189 F. Supp. 2d 719, 724 (N.D. Ohio 2002).

[5] This historical record is summarized in Craig Haney and Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis



solitary confinement cells in the Walnut Street jail was authorized by the Pennsylvania legislature in 1790, to house "the more hardened and atrocious offenders."[6] Some jurists soon recognized that solitary confinement was "a greater evil than certain death" and it was reported that prisoners in solitary "beg, with the greatest earnestness, that they may be hanged out of their misery."[7]

When a similar form of solitary confinement was tried in New York,[8] Gustav Beaumont and Alexis de Tocqueville recorded the outcome: "This experiment, of which such favourable results had been anticipated, proved fatal for the majority of prisoners. It devours the victim incessantly and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away..."[9] Another historian also

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of Supermax and Solitary Confinement, 23 *New York Review of Law & Social Change* 477, 481-496 (1997).

[6] Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania* Indianapolis: Bobbs-Merrill (1927), at 118-120.

[7] Enoch Edwards, president of the Philadelphia Court of Quarter-Sessions, charging a grand jury in 1791. Quoted in Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*. New York: Oxford University Press (1989), at 83.

[8] See Adam J. Hirsch, From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts, 80 *Michigan Law Review* 1178-1269 (1982), for a discussion of the forms of imprisonment in use during this period.

[9] Quoted in Torsten Eriksson, *The Reformers, An Historical Survey of Pioneer Experiments in the Treatment of Criminals*. New York: Elsevier (1976), at 49. See, also, W. Davis Lewis, *From Newgate to*

termed the Auburn experiment a "hopeless failure" and noted that it had "led to a marked prevalence of sickness and insanity on the part of the convicts in solitary confinement."[10]

Numerous states experimented with the Pennsylvania system during the nineteenth century, only to abandon the practice in light of its adverse effects.[11] United States Supreme Court Justice Miller summarized a hundred years of experience with solitary confinement:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and

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*Dannemora: The Rise of the Penitentiary in New York, 1796-1848.* Ithaca, NY: Cornell University Press (1965), at 17-21.

[10] Harry Elmer Barnes, The Historical Origin of the Prison System in America, 12 *Journal of Criminal Law and Criminology* 35-60 (1921), at 53.

[11] Barnes recounted the following history of adoption and abandonment of the so-called "Pennsylvania system" of complete solitary confinement in the United States:

| | Introduced | Abandoned |
|---|---|---|
| Maryland | 1809 | 1838 |
| Massachusetts | 1811 | 1829 |
| Maine | 1824 | 1827 |
| New Jersey | 1820 | 1828 |
| " " | 1833 | 1858 |
| Virginia | 1824 | 1833 |
| Rhode Island | 1838 | 1844 |

*Supra* note 10, at 56, n. 54.



> others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[12]

In addition to this historical record, empirical research on settings and situations in some ways analogous to solitary confinement has reached consistent conclusions about the painful and stressful nature of the experience. According to the definition of "sensory deprivation" offered by medical researcher Leo Goldberger—as an "experimental condition aimed at reducing, altering, or by some means or other, interfering with a person's normal stimulation from, and commerce with, his environment"[13]—then virtually all forms of solitary and supermax confinement would qualify. Although most research on sensory deprivation per se has been done in artificial environments intended for only short-term exposure, we do know that participants characteristically have experienced a variety of negative psychological reactions, including high levels of anxiety. These studies also suggest that failing to inform participants of the upper time limit of the study aggravates the negative effects of the isolation.[14] In any

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[12] In re Medley, 134 U.S. 160, 168 (1890).

[13] Leo Goldberger, Experimental Isolation: An Overview, 122 *American Journal of Psychiatry* 774-783 (1966), at 774.

[14] Marvin Zuckerman, Variables Affecting Deprivation Results. In J. Zubek (Ed.), *Sensory Deprivation: Fifteen Years of Research*, New York: Appleton-Century-Crofts (1969).

event, this research emphasizes the importance of sensory stimulation in human experience and the dramatic effects that can occur when such stimulation is completely curtailed.[15] In addition:

> One of the most important results of sensory deprivation experiments has been the finding that the resultant psychologic disturbances are virtually universal. Similar symptoms occurring in the deaf, and in explorers and prisoners had, in the past, been thought to be due to personal predisposition.[16]

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[15] As one psychiatrist who conducted sensory deprivation experiments put it: "[T]he conscious mind is dependent on constant contact with the outside world for alerting, for orientation, for programming, and for gaiting of responses. Unless there is the constant incoming flood of sensation, behavior is highly disturbed and can even be so badly disturbed as to bring on what amounts to transient psychotic states," Solomon, P., Quantitative Aspects of Sensory Deprivation. In Leo Madow & Laurence H. Snow (Eds.), *The Psychodynamic Implications of Physiological Studies on Sensory Deprivation* (pp. 28-54). Springfield, IL: Charles Thomas (1970), at 47. See also, Frederick Hocking, Extreme Environmental Stress and its Significance for Psychopathology, 24 *American Journal of Psychotherapy* 4-26 (1970).

[16] Hocking, *supra* note 15, at 7. Herbert Leiderman's review of much the same literature led him to similar conclusions:

> These disparate findings converge on one major point. Man is dependent on adequate and changing amounts of sensory and social stimulation in order to maintain his psychic and physiological functioning. When he lacks adequate supplies of stimuli, he may develop mental aberrations involving imagery similar to that of hallucinations, a loss of sense of time, a loss of motor coordination, become unable to think or reason clearly, become less able to initiate new tasks, perform less well on certain memory and visual tests, and perhaps become more susceptible to suggestion.

Herbert P. Leiderman, Man Alone: Sensory Deprivation and Behavioral Change, 8 *Corrective Psychiatry and Journal of Social Therapy* 64-74 (1962), at 73. See also, Paul Gendreau, N. Freedman, G. Wilde, and G. Scott, Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement, 79 *Journal of Abnormal Psychology* 54-59 (1972), who concluded that significant changes in EEG frequency and visual evoked potentials (VEP) in prisoners after one week of solitary confinement paralleled those reported in laboratory studies of sensory deprivation.



In a separate but related line of research, social isolation has been related to a number of other dysfunctional states and outcomes, including psychiatric illness.[17] The importance of social contact in grounding human identity and mental health is underscored by the frequent use of isolation to render people more malleable. Thus, coercive interrogation practices (including procedures once termed "brainwashing") virtually always include extreme forms of social isolation. As two students of these techniques wrote, a person "[e]xposed for the first time to total isolation... develops a predictable group of symptoms, which

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[17] For example, see: Neena Chappell & Mark Badger, Social Isolation and Well-Being, 44 *Journal of Gerontology* 169-176 (1989); Gary L. Tischler, Jerzy E. Henisz, Jerome K. Myers & Philip C. Boswell, Utilisation of Mental Health Services, 32 *Archives of General Psychiatry* 411-415 (1975); Graham Thornicroft, Social Deprivation and Rates of Treated Mental Disorder: Developing Statistical Models to Predict Psychiatric Service Utilisation, 158 *British Journal of Psychiatry* 475-484 (1991). See also, Margaret K. Cooke & Jeffrey H. Goldstein, Social Isolation and Violent Behavior, 2 *Forensic Reports* 287-294, 288 (1989).

might almost be called a 'disease syndrome.'"[18] Among the symptoms are bewilderment, anxiety, frustration, dejection, boredom, obsessive thoughts or ruminations, and depression. In addition, the authors observed that "[s]ome prisoners may become delirious and have visual hallucinations."[19]

In fact, other legal and mental health commentators have noted the frequency with which solitary confinement has been used as a form of torture,[20] underscoring its aversive nature and destructive potential.[21] Methods of psychological torture include

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[18] Lawrence E. Hinkle & Harold E. Wolff, Communist Interrogation and Indoctrination of "Enemies of the States," 76 *Archives of Neurology and Psychiatry* 115-174 (1956).

[19] Id. at 128.

[20] See, for example: W.E. Lucas, Solitary Confinement: Isolation as Coercion to Conform 9 *Australian & New Zealand Journal of Criminology* 153-167 (1976); Tim Shallice, Solitary Confinement—A Torture Revived? *New Scientist*, November 28, 1974; Raymone H. Thoenig, Comment: Solitary Confinement—Punishment Within the Letter of Law or Psychological Torture? 1972 *Wisconsin Law Review* 223-237 (1972).

[21] South African psychological researcher D. Foster, lists solitary confinement among the most common "psychological procedures" used to torture South African detainees. D. Foster, *Detention & Torture in South Africa: Psychological, Legal & Historical Studies*. Cape Town: David Philip (1987), at 69. He noted that "there can be little doubt that solitary confinement under these circumstances [in South Africa] should in itself be regarded as a form of torture" (at p. 136). For additional discussions of the use and effect of solitary confinement in South Africa, see J.G. Riekert, The DDD Syndrome: Solitary Confinement and a South African Security Law Trial. In A.N. Bell & R. D.A. Mackie (Eds.) *Detention and Security Legislation in South Africa* (pp. 121-147). Durban: University of Natal (1985); and Louis J. West, Effects of Isolation on the Evidence of Detainees.



stimulus deprivation, of which solitary confinement is an example, as well as so-called "constraint" techniques in which "[v]ictims are submitted to a detailed set of regulations and rules, resulting in close supervision where everything (including completely insignificant details) is controlled."[22] When used in this way as a method of torture, solitary confinement has been recognized as contributing to cognitive impairment, including the inability to think coherently and logically, as well as producing anxiety, anger and depression in its victims.[23]

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In A.N. Bell & R.D.A. Mackie (Eds.) *Detention and Security Legislation in South Africa* (pp. 69-80). Durban: University of Natal (1985). See, also, Hinkle & Wolff, *supra* note 18 (describing effects of isolation cells used by the "Communist State Police" in the Soviet Union and China).

[22] F.E. Somnier & I.K. Genefke, Psychotherapy for Victims of Torture, 149 *British Journal of Psychiatry* 323, 324 (1986). The authors systematically examined 230 torture victims in order to develop effective psychotherapeutic techniques with which to treat such patients. We note some obvious psychological similarities between the constraint techniques used to break the "will" of a subject in the course of interrogation and the regimens imposed in solitary or supermax confinement. Prisoners placed in solitary or supermax confinement have little control over their day to day existence—their diet, hygiene, daily schedule, reading materials and other possessions are carefully regulated and greatly restricted by prison personnel. Further, a defining characteristic of the use of this form of isolated segregation in correctional facilities is the loss of control over one's physical self. Prisoners housed in supermax units are subjected to greater amounts and degrees of physical restraint than those housed elsewhere and, of course, have no direct control over whether and when they can leave these physically oppressive conditions.

[23] For example: Somnier & Genefke, *supra* note 22; Shaun R. Whittaker, Counseling Torture Victims, 16 *The Counseling Psychologist* 272-278 (1988). As one commentator summarized:

## II. PROLONGED EXPOSURE TO THE STRESS OF EXTREME ISOLATION CREATES A SERIOUS RISK OF PSYCHOLOGICAL HARM.

Human beings cannot endure significant levels of uncontrollable stress for long periods of time without psychological harm. Although the magnitude of the harm will vary as a function of the nature of the stressor, the particular strengths and vulnerabilities of the person who endures it, and the length of time during which he or she is exposed, severe stress creates the substantial risk of some form of psychological harm. All other things being equal, the more prolonged and complete the isolation, the greater the risk of harm. Direct studies of solitary and solitary-like confinement reach consistent conclusions about the psychological stress that it creates for those persons subjected to it.

The harm that has been measured in many published studies is serious—in some instances, serious enough to exacerbate pre-existing psychological disorders, in others contributing to the emergence of previously unrecognized or undiagnosed symptoms. Here, too, the documentation is consistent from different sources. Some of the data are merely descriptive and observational. For example, in one early study Canadian researchers collected observational data on

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"Even the most unintrusive [torture] techniques were found to leave lasting psychological scars. For instance, sensory deprivation frequently led to anxiety, hypochondria, and hysteria." Matthew Lippman, The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 27 *Boston College International & Comparative Law Review* 275 (1994), at 310 (footnotes omitted).



the effects of solitary from 21 isolated prisoners.[24] The authors observed three response patterns that they described as typical of prisoners placed in isolation: verbal aggression, physical destruction of surroundings, and the development of an inner fantasy world, including paranoid psychosis. In addition, they observed an overall reaction to solitary confinement that they described as uncontrolled rage, including an increase in homicidal and suicidal impulses.

Accounts by psychiatrists working in several isolation units in California prisons raised similar concerns. They analyzed the extreme psychological adaptations that prisoners made to the extreme conditions of confinement. Psychiatrist Frank Rundle detailed conditions at Soledad's "adjustment center" (one precursor of the modern supermax) and concluded that the "madness" he witnessed in some of the prisoners who were confined there was a "partially functional and adaptive" response to the extreme conditions.[25] Specifically, Rundle watched some prisoners who had been isolated for days "become so desperate for relief that they would set their mattresses afire so as to force the staff to open the door and remove them from the torture chamber... "[26] Other prisoners "would burst out in a frenzied rage of aimless destruction, tearing their sinks and toilets from the walls, ripping their clothing

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[24] Bruno M. Cormier & Paul J. Williams, Excessive Deprivation of Liberty, 11 *Canadian Psychiatric Association Journal* 470-484 (1966).

[25] Frank Rundle, The Roots of Violence at Soledad. In Erik Olin Wright, (Ed.), *The Politics of Punishment: A Critical Analysis of Prisons in America*. (pp. 163-172) New York: Harper (1973).

[26] Id. at 167.

and bedding, and destroying their few personal possessions in order to alleviate the numbing sense of deadness or non-being and to escape the torture of their own thoughts and despair."[27]

Another descriptive small-scale study analyzed Maine prisoners held indefinitely in solitary confinement, most of whom had been given no reason for their isolation. It found that almost every isolated prisoner had attempted suicide, and that the prisoners often acted out in seemingly irrational ways—smashing their heads against the concrete walls, destroying their beds and light fixtures.[28] Similarly, attorney Michael Jackson

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[27] *Ibid.* Similarly, psychiatrist Robert Slater observed the psychiatric consequences for "large numbers" of prisoners in their attempts "to cope with the psychological effects of terror as well as the debilitating effects of long-term lockup, excessive noise, poor sanitary conditions, sensory overload or deprivation... lack of privacy, brutality, isolation, and pests." Robert Slater, Psychiatric Intervention in an Atmosphere of Terror, 7(1) *American Journal of Forensic Psychiatry* 5-12 (1986), at p. 10. Slater's description of the symptoms suffered by these prisoners in reaction to their severely restrictive environment included:

> ...tension, irritability, sleeplessness, nightmares, inability to think clearly or to concentrate, and fear of impending loss of impulse control. Sometimes the anxiety is severe enough to be crippling. It interferes with sleep, concentration, work, and study and predisposes to brief psychotic reactions, suicidal behavior and psychophysiological reactions. It causes misperceptions and over-reactions. It fuels the cycle of violence, leading to more violence and terror.

*Ibid.*

[28] Thomas B. Benjamin and Kenneth Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine Prison, 9 *Clearinghouse Review* 83-90 (1975);



inspected segregation units in Canada and found that prisoners reported difficulties concentrating on even simple tasks, experienced headaches, mental and physical deterioration, emotional flatness, lability, breakdowns, hallucinations, paranoia, hostility and rage, and some were beset with thoughts of self-mutilation and suicide (which some acted upon).[29]

In more systematic research involving hundreds of in-depth interviews with isolated prisoners, psychologist Hans Toch concluded that "isolation panic" was a serious problem among prisoners in solitary confinement. Symptoms reported included rage, panic, loss of control and breakdowns, psychological regression, a build-up of physiological and psychic tension that led to incidents of self-mutilation.[30] Toch noted that this kind of confinement marked an important dichotomy for prisoners: the "distinction between imprisonment, which is tolerable, and isolation, which is not."[31]

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Thomas B. Benjamin and Kenneth Lux, Solitary Confinement as Psychological Punishment, 13 *California Western Law Review* 265-296 (1977). For example, one nearly died from loss of blood after cutting himself up with his broken light bulb, another swallowed glass, and a number of prisoners attempted hanging (several successfully).

[29] Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada*. Toronto: University of Toronto Press (1983).

[30] Hans Toch, *Men in Crisis: Human Breakdowns in Prisons*. Aldine Publishing Co.: Chicago (1975).

[31] Id. at 54.

Similarly, psychologist Thomas Hilliard wrote that the "caging" and chaining of prisoners in the San Quentin Adjustment Center, the absence of meaningful exercise, activity, or other outlets through which to release their frustration, combined with the indeterminacy of the terms, the absence of any program leading to their release, and the sense that they might never be freed from such confinement was creating overwhelming tension and anxiety. The prisoners experienced a "pervasive sense of frustration and hopelessness," "deep feelings of despair," and the possibility that the psychological pain of their confinement might drive them "to extreme actions, and desperate solutions."[32] Hilliard concluded finally that conditions of confinement in the Adjustment Center were "overwhelmingly negative and antagonistic to effective rehabilitation," and that they were "both hostile and provocative" because they "provok[ed] hostility, resentment and resistance."[33]

In a particularly thorough psychiatric assessment of prisoners in solitary confinement, psychiatrist Stuart Grassian reported on 15 prisoners kept in isolation for varying amounts of time at a Massachusetts prison.[34]

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[32] Thomas Hilliard, The Black Psychologist in Action: A Psychological Evaluation of the Adjustment Center Environment at San Quentin Prison, 2 *Journal of Black Psychology* 75-82 (1976), at 80. Conditions in the Adjustment Center were described in Spain v. Procunier, 408 F. Supp. 534 (1976), *aff'd in part, rev'd in part*, 600 F. 2d 189 (9th Cir. 1979).

[33] Id. at 81.

[34] Stuart Grassian, Psychopathological Effects of Solitary Confinement, 140 *American Journal of Psychiatry* 1450-1454 (1983). See also, Stuart Grassian and Friedman, N., Effects of Sensory



The prisoners, initially reluctant to speak candidly about their experiences in solitary, described a series of psychiatric symptoms that were "strikingly consistent among the inmates."[35] Two-thirds of them had become hypersensitive to external stimuli (noises, smells, etc.) and about the same number experienced "massive free floating anxiety." About half of the prisoners suffered from perceptual disturbances that for some included hallucinations and perceptual illusions, and another half complained of cognitive difficulties like confusional states, difficulty concentrating, and memory lapses. About a third also described thought disturbances such as paranoia, aggressive fantasies, and impulse control problems. Three out of the fifteen had cut themselves in suicide attempts while in isolation. In almost all instances the prisoners had not previously experienced any of these psychiatric reactions, and all reported that their symptoms subsided shortly after being given a brief respite from isolation (which took place, by law, every 15 days). Grassian concluded that "rigidly imposed solitary confinement may have substantial psychopathological effects and that these effects may form a clinically distinguishable syndrome."[36] He also noted that: "[S]olitary

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Deprivation in Psychiatric Seclusion and Solitary Confinement, 8 *International Journal of Law and Psychiatry* 49-65 (1986).

[35] Grassian, *supra* note 34, at 1452.

[36] Id. at 1453. Compare Barte's analysis of the "psychopathogenic" effects of solitary confinement in French prisons and his conclusion that prisoners placed there for extended periods of time could become schizophrenic instead of receptive to social rehabilitation. Henri N. Barte, L'Isolement Carceral, 28 *Perspectives Psychiatriques* 252 (1989). Other social scientific and clinical literature published in international journals has reached many of the same conclusions. For example, see Reto Volkart, Einzelhaft: Eine

Literaturubersicht (Solitary confinement: A literature survey), 42 *Psychologie - Schweizerische Zeitschrift fur Psychologie und ihre Anwendungen* 1-24 (1983) (reviewing the empirical and theoretical literature on the negative effects of solitary confinement); Reto Volkart, Adolf Dittrich, Thomas Rothenfluh, & Paul Werner, Eine Kontrollierte Untersuchung uber Psychopathologische Effekte der Einzelhaft (A controlled investigation on psychopathological effects of solitary confinement), 42 *Psychologie - Schweizerische Zeitschrift fur Psychologie und ihre Anwendungen* 25-46 (1983) (when prisoners in "normal" conditions of confinement were compared to those in solitary confinement the latter were found to display considerably more psychopathological symptoms that included heightened feelings of anxiety, emotional hypersensitivity, ideas of persecution, and thought disorders); Reto Volkart, et al., Einzelhaft als Risikofaktor fur Psychiatrische Hospitalisierung (Solitary confinement as a risk for psychiatric hospitalization), 16 *Psychiatria Clinica*, 365-377 (1983) (finding that prisoners who had been kept in solitary confinement were overrprepresented among prisoners who were hospitalized in a psychiatric clinic); Boguslaw Waligora, Funkcjonowanie Czlowieka W Warunkach Izolacji Wieziennej (How men function in conditions of penitentiary isolation), *Seria Psychologia I Pedagogika* NR 34, Poland (1974) (so-called "pejorative isolation" of the sort that occurs in prison strengthens "the asocial features in the criminal's personality thus becoming an essential cause of difficulties and failures in the process of his resocialization"). See also, Ida Koch, Mental and Social Sequelae of Isolation: The Evidence of Deprivation Experiments and of Pretrial Detention in Denmark, in *The Expansion of European Prison Systems, Working Papers in European Criminology No. 7* 119 (Bill Rolston & Mike Tomlinson eds. 1986) who found evidence of "acute isolation syndrome" among detainees that occurred after only a few days in isolation and included "problems of concentration, restlessness, failure of memory, sleeping problems and impaired sense of time an ability to follow the rhythm of day and night" (at 124). If the isolated confinement persisted—"a few weeks" or more, some detainees developed "chronic isolation syndrome," including intensified difficulties with memory and concentration, "inexplicable fatigue," a "distinct emotional lability" that can include "fits of rage," hallucinations, and the "extremely common" belief among isolated inmates that "they have gone or are going mad" (at 125).



confinement cannot be viewed as a single entity. The effects of solitary confinement situations vary substantially with the rigidity of the sensory and social isolation imposed."[37]

Finally, psychologist Craig Haney studied prisoners in a "state-of-the-art" supermax prison that housed prisoners who had committed serious disciplinary infractions or were suspected of prison gang activity.[38] Haney's use of a random (and therefore representative) sample of prisoners in supermax confinement allowed him to establish prevalence rates (i.e., an estimate of how widespread the psychological reactions were among the group of persons confined in supermax).[39] This study found extraordinarily high rates of symptoms of psychological trauma. More than four out of five of those evaluated suffered from feelings of anxiety and nervousness, headaches, troubled sleep, and lethargy or chronic tiredness, and over half complained of nightmares, heart palpitations, and fear of impending nervous breakdowns. Equally high numbers reported specific psychopathological effects of

[37] Grassian, *supra* note 34, at 1454.

[38] Haney, *supra* note 3.

[39] Another study of a random sample of prisoners in a supermax-like setting found symptom prevalence rates nearly as high, suggesting that these levels were not unique to the facility at issue in the Haney study. See Stanley Brodsky and Forrest R. Scogin, Inmates in Protective Custody: First Data on Emotional Effects, 1 *Forensic Reports* 267-280 (1988). Although they studied isolation in the context of protective custody rather than supermax housing, Brodsky and Scogin described conditions of isolation and restricted movement that paralleled many of those that exist in most supermaxes.

social isolation—obsessive ruminations, confused thought processes, an oversensitivity to stimuli, irrational anger, and social withdrawal. Well over half reported violent fantasies, emotional flatness, mood swings, chronic depression, and feelings of overall deterioration, while nearly half suffered from hallucinations and perceptual distortions, and a quarter experienced suicidal ideation.[40]

The overall consistency of these findings—the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods—is striking. The well-documented psychological risks created by long-term prison isolation are matters of grave concern to *Amici*.[41] To

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[40] See, also, Whittaker, *supra* note 23 to the effect that solitary confinement "leads the person to fantasize and daydream. Logical and coherent thinking becomes impossible. The person becomes anxious, angry, and depressed" (at 273). These results are consistent with studies of other populations exposed to long-term solitary confinement.

[41] As a recent report presented to the European Court of Human Rights summarized: "The serious physiological, psychological and psychiatric effects of solitary confinement on prison inmates are by now very well documented by a long history and by extensive research—by psychologists, psychiatrists, sociologists, criminologists, historians, etc. from many different countries in different parts of the world." Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates. A Report to the European Court of Human Rights*, May, 2004, p., 37. The single study that failed to find serious negative effects was limited to 60-days of supermax-type confinement. See Ivan Zinger, Cherami Wichmann, and D. Andrews, Segregation: The Psychological Effects of 60 Days in Administrative Segregation, 41 *Canadian Journal of Criminology* 47-83 (2001). The authors themselves conceded that the results of this study were "somewhat irrelevant to current segregation practices



summarize, these effects include increases in the following potentially damaging symptoms and problematic behaviors: negative attitudes and affect,[42] insomnia,[43] anxiety,[44] panic,[45] withdrawal,[46]

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in the United States..." Ivan Zinger & Cherami Wichmann, *The Psychological Effects of 60 Days in Administrative Segregation*. Research Branch. Correctional Services of Canada (1999), at p. 64. Indeed, in Ohio, prisoners are kept in OSP for a minimum of a full year, and many prisoners spend several years or more there. Austin v. Wilkinson, 189 F.Supp. 719, 726 (2002).

[42] For example, see: Michael Bauer, Stefan Priebe, Bettina Haring & Kerstin Adamczak, Long-Term Mental Sequelae of Political Imprisonment in East Germany, 181 *Journal of Nervous & Mental Disease* 257-262 (1993) (a study of persons who had spent at least six weeks in political imprisonment that included solitary confinement); Hilliard, *supra* note 32; Richard Korn, The Effects of Confinement in the High Security Unit at Lexington, 15 *Social Justice* 8-19, (1988); Richard Korn, Follow-up Report on the Effects of Confinement in the High Security Unit at Lexington, 15 *Social Justice* 20-29 (1988) (studies of women federal prisoners subjected to "small group isolation"); Koch, *supra* note 36; Holly Miller & Glenn Young, Prison Segregation: Administrative Detention Remedy or Mental Health Problem? 7 *Criminal Behaviour and Mental Health* 85-94 (1997); Peter Suedfeld, Carmenza Ramirez, John Deaton, & Gloria Baker-Brown, Reactions and Attributes of Prisoners in Solitary Confinement, 9 *Criminal Justice & Behavior* 303-340 (1982).

[43] For example, see: Bauer et al., *supra* note 42; Brodsky & Scogin, *supra* note 39; Haney, *supra* note 3; Koch, *supra* note 36; Korn, *supra* note 42.

[44] For example, see: Henrik Andersen, Dorte Sestoft, Tommy Lillebaek, Gorm Babrielsen, & Ralf Hemmingsen, A Longitudinal Study of Prisoners on Remand: Repeated Measures of Psychopathology in the Initial Phase of Solitary Versus Nonsolitary Confinement, 26 *International Journal of Law & Psychiatry* 165-177 (2003); Brodsky & Scogin, *supra* note 39; Grassian, *supra* note 34; Haney, *supra* note 3; Hilliard, *supra* note 32; Koch, *supra* note 36;

hypersensitivity to stimuli,[47] ruminations,[48] cognitive dysfunction,[49] hallucinations,[50] loss of control,[51] irritability, aggression, and rage,[52] paranoia,[53]

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Korn, *supra* note 42; Toch, *supra* note 30; Volkart, Dittrich, Rothenfluh & Werner, *supra* note 36; Richard Walters, John Callagan & Albert Newman, Effect of Solitary Confinement on Prisoners, 119 *American Journal of Psychiatry* 771-773 (1963).

[45] For example, see: Toch, *supra* note 30.

[46] For example, see: Cormier & Williams, *supra* note 24; Haney, *supra* note 3; Miller & Young, *supra* note 42; G. Scott & M. Gendreau, Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison, 14 *Canadian Psychiatric Association Journal* 337-341 (1969); Toch, *supra* note 30; Waligora, *supra* note 36.

[47] For example, see: Grassian, *supra* note 34; Haney, *supra* note 3; Volkart, Dittrich, Rothenfluh & Werner, *supra* note 36.

[48] For example, see: Brodsky & Scogin, *supra* note 39; Haney, *supra* note 3; Korn, *supra* note 42; Miller & Young, *supra* note 42.

[49] For example, see: Brodsky & Scogin, *supra* note 39; Grassian, *supra* note 34; Haney, *supra* note 3; Koch, *supra* note 36; Korn, *supra* note 42; Miller & Young, *supra* note 42; Peter Suedfeld & Chunilal Roy, Using Social Isolation to Change the Behavior of Disruptive Inmates, 19 *International Journal of Offender Therapy & Comparative Criminology* 90-99 (1975); Volkart, Dittrich, Rothenfluh & Werner, *supra* note 36.

[50] For example, see: Brodsky & Scogin, *supra* note 39; Grassian, supra note 34; Haney, *supra* note 3; Koch, *supra* note 36; Korn, *supra* note 42; Suedfeld & Roy, *supra* note 49.

[51] For example, see: Grassian, *supra* note 34; Haney, *supra* note 3; Suedfeld & Roy, *supra* note 49; Toch, *supra* note 30.

[52] For example, see: Bauer et al., *supra* note 42; Brodsky & Scogin, *supra* note 39; Cormier & Williams, *supra* note 24; Grassian, *supra* note 34; Haney, *supra* note 3; Hilliard, *supra* note 32; Koch, *supra*



hopelessness,[54] lethargy,[55] depression,[56] a sense of impending emotional breakdown,[57] self-mutilation,[58] and suicidal ideation and behavior.[59] The damaging effects ranged in severity and included such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.

These studies of the psychiatric and psychological effects of isolated confinement focused on discrete and measurable consequences. However, there are other

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note 36; Miller & Young, *supra* note 42; Suedfeld, Ramirez, Deaton, & Baker-Brown, *supra* note 42; Toch, *supra* note 30.

[53] For example, see: Cormier & Williams, *supra* note 24; Grassian, *supra* note 34; Volkart, Dittrich, Rothenfluh & Werner, *supra* note 36.

[54] For example, see: Haney, *supra* note 3; Hilliard, *supra* note 32.

[55] For example, see: Brodsky & Scogin, *supra* note 39; Haney, *supra* note 3; Koch, *supra* note 36; Scott & Gendreau, *supra* note 46; Suedfeld and Roy, *supra* note 49.

[56] For example, see: Andersen, et al., *supra* note 44; Brodsky & Scogin, *supra* note 39; Haney, *supra* note 3; Hilliard, *supra* note 32; Korn, *supra* note 42.

[57] For example, see: Brodsky & Scogin, *supra* note 39; Grassian, *supra* note 34; Haney, *supra* note 3; Koch, *supra* note 36; Korn, *supra* note 42; Toch, *supra* note 30.

[58] For example, see: Benjamin & Lux, *supra* note 28; Grassian, *supra* note 34; Toch, *supra* note 30.

[59] For example, see: Benjamin & Lux, *supra* note 28; Cormier & Williams, *supra* note 24; Grassian, *supra* note 34; Haney, *supra* note 3.

psychiatric and psychological changes that are common in such confinement that do not lend themselves to quantification but are extremely familiar to mental health professionals. These may be equally if not more problematic fo. the future health and well-being of prisoners and those around them. Many prisoners gradually change their patterns of thinking, acting, and feeling in order to survive the rigors of supermax and, for some, these changes may persist or even become permanent. Although they do not represent clinical syndromes per se, these patterns of behavior are dysfunctional in more normal social settings.

Thus, the unique totality of the control in supermax units requires prisoners to become highly dependent upon the institution to organize their daily existence. Some supermax prisoners gradually lose the ability to initiate or to control their own behavior, or to organize their personal lives. The two separate components of this reaction—problems with the self control and self initiation of behavior—are both adaptations to an institutional regime that *limits* virtually all aspects of their behavior. Some prisoners become uncomfortable with even small amounts of freedom because they lose confidence in their own ability to behave without the constant and rigid restrictions to which they have become accustomed.

In addition, because so much of a person's individual identity depends on interaction with others, the virtually complete absence of normal human contact undermines their sense of self and-the sense of being connected to a larger social world. For some the experience of total social isolation leads, paradoxically,



to social withdrawal, which may persist even after their release from supermax confinement.

We have also seen how the prolonged deprivations, severe restrictions, and the totality of control in supermax can create high levels of frustration in that may turn to anger or sudden outbursts of rage, with some prisoners becoming consumed by the fantasy of revenge against people they perceive as having unfairly provoked, thwarted, or oppressed them.

These observations suggest skepticism about the value of supermax prisons in achieving their main purpose of reducing violence in prison systems. Given the well-documented destructive effects of extreme or prolonged isolation discussed earlier in this brief, the intense frustrations of supermax confinement (including increases in negative affect; loss of control, irritability, aggression, and rage; and paranoia),[60] and the tendency of frustration to lead to aggression,[61] we would expect supermax confinement to increase or at best to have no effect on an individual's violence potential rather than decreasing it. Moreover, prison violence that comes about for structural reasons—for example, overcrowded conditions or the lack of meaningful or effective programming—would not be abated by the

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[60] As cited *supra* in notes 42, 51, 52, and 53.

[61] For example, see Leonard Berkowitz, Situational Influences on Aggression, in J. Groebel & R. Hinde, (Eds.), *Aggression and War: Their Biological and Social Bases* (pp. 91-100). Cambridge, England: Cambridge University Press, (1989). One of the early studies on prolonged isolation concluded that one of its effects was to mobilize the potential for aggression. See Cormier & Williams, *supra* note 24.

supermax prison. Some researchers have concluded that more severe levels of restriction imposed on inmates in segregated housing may increase problems within prison systems rather than relieving them.[62]

Thus, it is not surprising that as one review of the nature and status of the supermax put it: "All the evidence points to the opposite being true. The creation of control units and increased use of administrative segregation have not reduced the level of violence within general prison populations."[63] A more recent, systemic study of the effects of supermax in three different states concluded that "[t]he findings presented here reveal that the opening of a supermax had no effect on eight of the measures of institutional violence examined across three states."[64] The authors found "no support" for the proposition that supermaxes reduced aggregate levels of inmate-on-inmate assaults, and that

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[62] For example, see: Miller & Young, *supra* note 42.

[63] Rodney Henningsen, Wesley Johnson, and Terry Wells, Supermax Prisons: Panacea or Desperation, 3 *Corrections Management Quarterly* 53-59 (1999), at p. 55. Another recent review of the literature on supermax prisons concluded much the same thing: "[t]he extant empirical research on supermax facilities suggests that these institutions have the potential to damage inmates' mental health while failing to meet their purported goals (e.g., deterring inmates in the general prison population from committing criminal acts inside prison)." Jesenia Pizarro and Vanja Stenius, Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates, 84 *Prison Journal* 248 (2004).

[64] Chad Briggs, Jody Sundt, and Thomas Castellano, The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence, 41 *Criminology* 301 (2003), at p. 325.



it produced stable reductions in inmate-on-staff assaults in only one of the three states in which it was studied.

Finally, we note the important role that the perception of fair treatment plays in a context such as this. Much psychological research has addressed the importance of the perception of fair process in the evaluation of the quality of justice dispensed in any legal setting.[65] Supermax prisons are no exception. In fact, because of the severity of the restrictions, the level of the deprivation, and the potential psychological harm imposed, the need for fair process may be greater here (and the failure to provide such fairness may exacerbate the psychological stress experienced). We note that Michael Jackson's study of isolated Canadian prisoners revealed that "the single most important factor in [the segregated inmates'] descriptions of the effects that segregation had upon them" was "the prisoner's experience of the justice or injustice of his segregation."[66] Moreover, as one comprehensive review of the psychological effects of imprisonment observed,

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[65] For example, see: John Darley, Sol Fulero, Craig Haney, & Tom Tyler, Psychological Jurisprudence: Taking Psychology and Law into the Twenty-First Century, in James Ogloff (Ed.), *Taking Psychology and Law into the Twenty-First Century* (pp. 35-59). New York: Kluwer Academic/Plenum Publishing (2002). Psychologist Tom Tyler has produced much of this research. For example, see: Tom Tyler, Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want From the Law and Legal Institutions? 19 *Behavioral Science & the Law* 215-235 (2001); and Tom Tyler & Allen Lind, Procedural Justice, in Joseph Sanders & Lee Hamilton (Eds.), *Handbook of Justice Research in Law* (pp. 65-92). Dordrecht, Netherlands: Kluwer Academic Publishers (2001).

[66] Jackson, *supra* note 29, at p. 114.

"when inmates are dealt with capriciously by management... psychological stress can be created even in the most humane prison environments."[67]

## CONCLUSION

Severe conditions of isolated confinement such as those found in supermax prisons inflict psychological pain and distress and, if prolonged, create a serious risk of harm for prisoners. These facts strongly support requiring carefully designed and fair procedures that avoid unnecessary—erroneous, overreaching, or premature—placement in supermax prisons. Insofar as the lower court imposed procedures designed to ensure greater care, reliability, and fairness in supermax placement and retention decisions, its decision should be affirmed.

Respectfully submitted,

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[67] James Bonta and Paul Gendreau, Reexamining the Cruel and Unusual Punishment of Prison Life, 14 *Law and Human Behavior* 347-372 (1990), at p. 361.